Supreme Court, U.S.
FILED

COPY

041162 JAN 26 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICOH ELECTRONICS, INC.,

Petitioners,

v.

JAMES HALUCK and MICHAEL LITTON,

Respondents.

On Petition For Writ Of Certiorari
To The Court of Appeal, Fourth Appellate District, Division Three, IN THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Daniel J. Callahan
Konrad L. Trope
Counsel of Record
CALLAHAN & BLAINE, APLC
3 Hutton Centre Drive, Suite 900
Santa Ana, California 92707
(714) 241-4444
(714) 241-4445 (facsimile)

Counsel for Petitioner

No.

IN THE
Supreme Court of the United States

RICOH ELECTRONICS, INC.,

Petitioners,

v.

JAMES HALUCK and MICHAEL LITTON,

Respondents.

On Petition For Writ Of Certiorari
To The Court of Appeal, Fourth Appellate District, Division Three, IN THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Daniel J. Callahan
Konrad L. Trope
Counsel of Record
CALLAHAN & BLAINE, APLC
3 Hutton Centre Drive, Suite 900
Santa Ana, California 92707
(714) 241-4444
(714) 241-4445 (facsimile)

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Superior Court for the State of California erred as a matter of law, in denying Petitioner's motion for summary judgment whereby Petitioner, as a subsidiary of a foreign-based corporation, sought to invoke the rights of its parent corporation provided for under the U.S.-Japan Friendship, Commerce, and Navigation treaty and thereby violate the Supremacy Clause of the United States Constitution found at Article VI, Clause 2.

2. Whether the Superior Court for the State of California erred in rejecting, as a matter of law, Petitioner's defense to Respondent's claim for discrimination by rejecting Petitioner's invocation of the U.S.-Japan Friendship, Commerce, and Navigation Treaty and thereby violate Article II, Section 2, Clause 2 of the United States Constitution which provides that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties provided two thirds of the Senator's present concur . . ."

3. Whether the Superior Court for the State of California erred as a matter of law, in denying Petitioner's motion for summary judgment whereby Petitioner, as a subsidiary of a foreign-based corporation,

may invoke the rights of its parent corporation provided for under the U.S.-Japan Friendship, Commerce, and Navigation treaty and thereby violate Article I, Section 8, Clause 3 of the United States Constitution which provides that the Congress shall have the power to "regulate commerce with foreign nations, and among the several states . . ."

PARTIES TO THE PROCEEDING IN THE COURT BELOW AND STATEMENT PURSUANT TO RULE 29.6

* Ricoh Electronics, Inc., a California corporation, ("Ricoh-USA"), a wholly-owned subsidiary of Ricoh Company, Inc., a corporation organized and existing under the laws of the State of New Jersey , and which is a wholly- owned subsidiary of Ricoh Company, Ltd. ("Ricoh-Japan"), a corporation organized and existing under the laws of Japan;
* Larry Vaughn, a resident of the State of Georgia;
* Houssam El Jurdi, a citizen of the United States;
* Yoshihiro Nomura, a citizen of Japan;
* Haruo Uesaka, a resident of the State of Georgia;
* Yoji Ide, a citizen of Japan;
* Yasuaki Muramatsu, a citizen of Japan;
* Michael A. Litton ("Litton"), an individual residing in California; and
* James Haluck, an individual residing in California.

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 6

IV. STATEMENT OF THE CASE 7

A. Introduction 7

B. Facts and Procedural History 11

V. REASONS FOR GRANTING THE PETITION 16

A. There Is a Reasonable Probability That at Least Four Members of this Court Would Conclude That this Case Warrants Plenary Consideration .. 16

B. Petitioners Are Likely to Prevail on the Merits ... 17

1. Respondents' Claims for Discrimination are Barred by the U.S.-Japan FCN Treaty 17

2. The Alleged Discrimination Against Respondent Is Ricoh-USA-Japan's Temporary Assignment to Ricoh-USA

of Japanese Citizens as Executives and Technical Experts in Accordance with the U.S.-Japan FCN Treaty 18

3. As a Subsidiary of Ricoh-Japan, Ricoh-USA May Invoke the Rights of its Parent Provided for Under the U.S.-Japan FCN Treaty 22

4. Ricoh-USA Has Third Party Standing to Invoke the Rights of Ricoh-Japan Under the Treaty 24

C. Petitioner Will Suffer Irreparable Harm from the Denial of Its Petition for Certiorari and the Balance of the Equities Clearly Favors Issuance of a Stay 26

D. In the Absence of a Writ of Certiorari Issuing from U.S. Supreme Court, U.S-based Subsidiaries of Japanese Corporations and U.S. Employees Face Eminent and Irreparable Injury 28

X. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Bennett v. Total Minatome Corp.,

138 F. 3d 1053 (5th Cir. 1998) 15, 20, 23

Cox Broadcasting Corp. v. Cohn,

420 U.S. 469 (1975) 3

Edmonson v. Leesville Concrete Co.,

500 U.S. 614, 628-29 (1991) 25

Factor v. Laubenheimer,

290 U.S. 276 (1933) 29

Fortino v. Quasar Co.,

950 F.2d 389, 392 (7th Cir. 1991) 10, 14, 21, 22

Goodyear, Atomic Corp. v. Miller,

486 U.S. 174, 178-180 (1988) 5

Jeofrey v. Riggs,

133 U.S. 258 (1890) 29

Jordon v. Tashiro,

278 U.S. 123 (1928) 29

Kirmse v. Hotel Nikko,

51 Cal 4th 311, 321 (1996) 14

Kolovret v. Oregon,

366 U.S. 187 (1961) 29

MacNamara v. Korean Airlines

863 F. 2d 1135, 1144-45 (3d Cir. 1988).. 10, 12, 14, 20, 21

Mille Lacs Band of Chippewa Indians v. Minnesota,

864 F. Supp. 102, 105 (1994) 27

Nielsen v. Johnson,

279 U.S. 47 (1929) 29

Papaila v. Uniden America Corp.,

51 F. 3d 54, 55 (5th Cir. 1995) 15, 21,23,24

Republic Natural Gas Co. v. Oklahoma,

334 U.S. 62, 68 (1948) 3

Singleton v. Wulff,

428 U.S. 106, 113 (1976) 25

Spiess v. C. Itoh & Simple Co.,

643 F. 2d 353, 358-361 & N.2 (5th cir. 1979) 28

Sumitomo Shoji America, Inc. v. Avagliano,

457 U.S. 176, 189, 102 S.Ct. 2374 (1982) ... 16, 19, 22, 23

United States v. Michigan,

508 F. Supp. 480, 491(D. Mich. 1980) 26

Wickes v. Olympic Airways,

745 F. 2d 363, 367-368 (6th Cir. 1984) 20

Statutes

California Code of Civil Procedure § 437(c)(g) 2, 7

California Government Code § 12940 ..... 7, 15

California Labor Code § 970 7

4 U.S.C. 2063, 2070 20

28 U.S.C. § 1257(a) 2

420 U.S. at 482-83 4-5

Other Authority

Article II, Clause 2, U.S. Const. 5,6,9

Article III, Section 2, Clause 3, U.S. Const. 4

Article VI, Clause 2, Supremacy Clause, U.S. Const. 5

Art. II, U.S.-France FCN Treaty, 11 U.S.T 2398 (1959) 17

Article I of the U.S.-Japan FCN Treaty, 4 U.S.T. 2063 (1953) ... 17

Article VIII(1) of U.S.-Japan FCN Treaty 19

Art II, U.S.-Korea FCN Treaty, 8 U.S.T 2217 (1956) 20

Treaty of Friendship, Commerce and Navigation, April 2, 1953, U.S.-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 18

U.S. Sup. Ct. R. 10(c) 16

U.S. Sup. Ct. R. 14.1(f) 7

I. OPINIONS BELOW

The November 4, 2004 opinion/decision of the Supreme Court of California denying review of the Petition filed by Petitioner Ricoh-USA, is not reported, but is attached hereto as Exhibit "1" to the Appendices filed concurrently herewith.

The October 21, 2004 opinion/decision of the California Court of Appeals, 4th Appellate District, Division 3, rejecting Petitioner's Petition for Writ of Mandate is not reported, but is reproduced and attached hereto as Exhibit "2" to the Appendencies filed concurrently herewith.

The order / opinion of Superior Court of the State of California for the County of Orange, denying, as a matter of law, Petitioner's motion for summary adjudication invoking the protections of the U.S.-Japan FCN Treaty, is not reported, but exists in three forms. The trial court on September 28, 2004, issued a tentative opinion and posted said opinion/decision on the court's website, which can be found as Exhibit "3" in the Appendices filed concurrently herewith. The trial court also issued a more detailed tentative ruling on September 29, 2004, which can be found at

Exhibit "4" in the Appendices filed concurrently herewith. Lastly, in accordance with *California Code of Civil Procedure § 437(c)(g),* the trial court issued a formal ruling/opinion on November 8, 2004, which can be found at Exhibit "5", in the Appendencies filed concurrently herewith. None of the foregoing opinions are published.

II. JURISDICTION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." *28 U.S.C. § 1257(a).*

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. As this Court has long recognized, "[t]here have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory,

because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 68 (1948). As discussed below, absent an immediate stay from this Court, Petitioners face irreparable harm from the order of summary adjudication and the commencement of trial on December 6, 2004, where Petitioner's protection under the U.S. Japan FCN Treaty has been declared null and void. Trial is still in progress.

Moreover, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in the state courts. The fourth such category permits review even in "those situations where the federal issue has been finally decided in the state courts with further proceedings pending..." and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-483.

The fourth *Cox Broadcasting* category is plainly applicable here. The federal questions presented by this case have been finally decided by the courts below. The Superior Court for the State of California, supported by the California Court of Appeals and the California Supreme Court, squarely rejected Petitioners' arguments that the U.S.-Japan FCN Treaty protected Ricoh-USA from the employment discrimination claims of Respondents. Accordingly, a federal issue has been conclusively resolved, and there is no need for further state court proceedings to finalize or crystallize the lower court's disposition of the federal questions involving the Treaty with Japan, a Treaty that had been negotiated by the President "with the Advice and Consent of the Senate." *Article III, Section 2, Clause 3, United States Constitution.*

Moreover, reversal of the court below on any of the federal questions presented in this case "would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482-83.

Finally, it is readily apparent that "the California Supreme Court decision seriously erodes federal policy. *See* 420 U.S. at 483. In the instant case, the federal policy that is being seriously eroded by

the erroneous California Supreme Court decision is more than just policy: it is the Supreme Law of the Land. The President and the Senate are charged with the negotiation and execution and approval of treaties with foreign governments. *See Article II, Clause 2, U.S. Const.* For the California courts to directly and unequivocally disregard such constitutional mandates clearly interferes with the conduct of foreign relations and commerce with other nations delegated to the Congress and the President. *Id.; Article I, Section 8, U.S. Const.*

Moreover, those treaties are assured a status equal with other constitutional provisions. *See Supremacy Clause, Art. VI, Clause 2, U.S. Const.* Accordingly, *Cox* and related cases warrant review of "the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83; *accord Goodyear Atomic Corp.,* 486 U.S. at 178-79 (applying this exception where "the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production").

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States of America provides in pertinent part:

> "[That Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States and among the Indian tribes."

Article II, Section 2, Clause 2 of the Constitution of the United States of America provides in pertinent part:

> "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provide 2/3 of the Senators present concur . . ."

Article VI, Clause 3 of the Constitution of the United State of America provides in pertinent part:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Pursuant to this Court's *Rule 14.1(f)*, the provisions of California law involved in this case, including *California Code of Civil Procedure § 437c; California Labor Code § 970;* and *California Government Code § 12940,* as well as all other pertinent provisions of the Constitution of the United States of America, the United States Code, and various Treaties to which the United States is a party are reproduced at Exhibits "6" - "13" of the Appendices filed concurrently herewith.

IV. STATEMENT OF THE CASE

A. Introduction

By its decision on December 3, 2004, the California Supreme Court openly declared its repugnance to fundamental federal treaty rights protected by the Supremacy Clause of the United States

Constitution. California Supreme Court's decision affirmed a state trial court, where the trial judge explicitly declared his refusal to honor treaty rights and U.S. Supreme Court case law interpreting such treaty rights. Denial of fundamental constitutional rights concerning a federal treaty protected by the Supremacy Clause is presumed to be irreparable harm and a Writ of Certiorari from this Honorable Court to the California Supreme Court is absolutely essential as a matter of course.

The Superior Court for the State of California (trial court) on September 29, 2004 (with a formal written decision issued on November 8, 2004), held and declared as a matter of law that Petitioner Ricoh Electronics, Inc. ("Ricoh-USA" or "Petitioner"), a wholly-owned subsidiary of a Ricoh Company, Ltd. ("Ricoh-Japan"), a Japanese corporation, could not invoke the protections of the U.S.-Japan Treaty of Friendship, Commerce and Navigation in a lawsuit alleging employment discrimination by Respondents.

In seeking appellate review, both the California Court of Appeal and the California Supreme Court affirmed the trial court's refusal to recognize fundamental constitutional interests: (1) the

Supremacy Clause, (2) Article I, and (3) Article II of the United States Constitution. Thus Petitioner has been summarily denied relief by these State Court Appellate bodies on November 4, 2004, and December 3, 2004, respectively. Consequently, Petitioner now faces a trial which commenced on December 6, 2004, and then abruptly recessed until January 3, 2005. In this trial, the sole Federal question has been adjudicated with finality. Petitioner Ricoh-USA ***is barred as a matter of law from raising or enjoying the protections afforded under the FCN Treaty.***

Requiring Ricoh-USA even to stand trial to defend itself against claims of discrimination is an affront to the guarantees of the U.S.-Japan FCN Treaty. The FCN Treaty expressly recognizes the rights of companies of the signatories (that is, *both* the United States and Japan) to retain certain classes of employees, such as executives, attorneys or technical experts, "of their choice." 4 U.S.T. 2063, T.I.A.S. No. 2863, Article VIII(1).

The FCN Treaty promises "to foreign investors *the freedom to place their own citizens in key management positions,* thus facilitating their operational success in the host country."

MacNamara v. Korean Airlines, 863 F. 2d 1135, 1144-45 (3d Cir. 1988) (emphasis added) [construing Article VIII(1) of the Korean FCN Treaty, which is nearly identical to that of the U.S.-Japan FCN Treaty]. Thus, "discrimination in favor of foreign executives *given a special status by virtue of a treaty* and its implementing regulations is not equivalent to discrimination on the basis of national origin or race." *Fortino v. Quasar Co.,* 950 F.2d 389, 392 (7th Cir. 1991) (emphasis added).

Ricoh-Japan's and Ricoh-USA's freedom to place key Japanese personnel without fear of discrimination complaints, as guaranteed by the FCN Treaty, is a matter of international sovereignty. Interference with this protected right threatens to undermine the Supreme Law of the United States. Review by this Honorable Court of the summary denial of Ricoh-USA's invocation of the FCN Treaty is essential to settle the issue of whether domestic subsidiaries of foreign corporations enjoy the same protections that their parents do, when their parents place key personnel with the domestic subsidiary.

B. Facts and Procedural History

In 1973, Ricoh-USA, was organized as a wholly-owned subsidiary corporation of Ricoh Company, Ltd., a Japanese corporation organized and operating under the laws of Japan.[1] Based in Tustin, California, and Lawrenceville, Georgia, Ricoh-USA is Ricoh-USA-Japan's manufacturing subsidiary in the U.S. responsible for the production of toner and thermal media, plain-paper copier, and printed circuit board technology.

At Ricoh-USA, in particular, the rotation of Japanese "expatriate" executives into the corporate hierarchy permits Ricoh-USA to utilize and capitalize upon the unique knowledge and experience these individuals from Ricoh-Japan have with newly developed technology (i.e., the engineering and production of a new

---

[1] Ricoh-USA was subsequently reorganized as a wholly owned (100%) subsidiary of Ricoh Corporation ("Ricoh-New Jersey"), organized and operating in the State of New Jersey, which in turn is a wholly owned subsidiary (100%) of Ricoh Company, Ltd. ("Ricoh-Japan"). Ricoh-New Jersey was incorporated as the sales component of Ricoh-Japan's U.S. business, while Ricoh-USA was incorporated as Ricoh-Japan's manufacturing arm. Ricoh-USA represents a small part of the worldwide operation of Ricoh-Japan, which consists of 376 subsidiaries and 28 affiliates that develop, produce, market, sell, and recycle office equipment, including copiers and printers, information equipment, optical devices. Nomura Decl. ¶ 2-3.

product line or technology developed in Japan). Thus, Ricoh-Japan will temporarily assign its uniquely qualified personnel to fill those needs. The appropriate individuals at Ricoh-Japan evaluate the identified needs and determine who, from among its managerial or technical staff in Japan, might appropriately fill the void at Ricoh-USA. Because virtually all of Ricoh-Japan's managerial and technical staff are Japanese nationals, the uniquely qualified personnel that Ricoh-Japan assigns to Ricoh-USA have been Japanese. Because they are assigned to Ricoh-USA on a temporary basis,[2] and remain employees of Ricoh-Japan, the Japanese expatriates are evaluated by individuals at Ricoh-Japan in accordance

---

[2] The particular need as identified by Ricoh-USA dictates what type of visa application Ricoh-USA makes to the Bureau of Citizenship and Immigration Services ("BCIS"). Some expatriates have entered the U.S. on E-2, or treaty investor, visas, which provide non-immigrant status for a national of any country with which an appropriate treaty of navigation and commerce exists. *See* Immigration and Nationality Act ("INA"), *8 U.S.C. § 1101(a)(15)(E)*. Other individuals have entered the U.S. for assignment at Ricoh-USA on L-1A or L-1B visas, which provide non-immigrant status for multi-national executives and managers or employees with specialized knowledge of the company's products, processes, or procedures. *See* INA, *8 U.S.C. § 1101(a)(15)(L)*. The government's decision to grant entry of an individual pursuant to one of these visa categories is strong evidence of that individual's executive, managerial, or specialized knowledge status for purposes of Article VIII(1). *MacNamara v. Korean Airlines*, 863 F. 2d 1135, 1141-1142 (3d. Cir. 1988).

with the system in place at the parent company, although individuals at Ricoh-USA may provide input into the overall evaluation.

On August 12, 2003, Plaintiff Haluck and Litton ("Plaintiffs and/or Respondents") filed a lawsuit against Ricoh-USA, and a number of executives and managers of the company, including LARRY VAUGHN ("Vaughn"), HARUO UESAKA ("Uesaka"), YOJI IDE ("Ide"), YOSHIHIRO NOMURA ("Nomura"), HOUSSAM EL JURDI ("El Jurdi"), and YASUAKI MURAMATSU ("Muramatsu"). Respondents allege that Ricoh-USA intentionally discriminated against them on the basis of "national origin and race" in violation of the Fair Employment and Housing Act ("FEHA") (*California Government Code § 12940),* when Ricoh-Japan placed Japanese nationals on a temporary basis in key management and technical positions at Ricoh-USA.[3]

---

[3] Respondents further allege that when they complained about the purported discrimination, Petitioners retaliated against them by failing to consider them for promotions and corresponding raises in pay, failing to prevent discrimination, perpetrating adverse employment actions against them in violation of public policy, breaching an implied employment contract in bad faith, and thereby causing them emotional distress. Litton further alleges Petitioner misrepresented the nature of his employment with Petitioner, upon which he relied to relocate to California, and ultimately terminated him in retaliation for his complaints.

On May 28, 2004, Ricoh-USA moved for summary adjudication of several of Plaintiffs' claims for discrimination on grounds that, *inter alia,* these discrimination charges were barred by the Treaty of Friendship, Commerce and Navigation between the United States and Japan. *See Article VIII(1) of U.S.-Japan FCN Treaty* attached hereto as Exhibit 13 of the Appendices filed concurrently herewith. On September 29, 2004, the California Superior Court denied Ricoh-USA's motion for summary adjudication as to Respondent's claims for discrimination on the basis of race and national origin.

Nevertheless, the California (Trial) Superior Court specifically stated that it disagreed with the federal case law and any interpretation of the Treaty so far as Petitioner Ricoh-USA was concerned. *See* Exhibit "14" at pages 5-6. *See, also,* Exhibit "5" at page 2, in which the court declared that the case of *Kirmse v. Hotel Nikko*, 51 Cal 4th 311, 321 (1996), as a statement of California law, controlled and supported the trial court's denial of Petitioner Ricoh-USA's invocation of the U.S.-Japan Treaty. Indeed, the court specifically ignored the holdings of *MacNamara v. Korean Airlines*,

863 F. 2d 1135, 1144-45 (3rd Cir. 1988); *Bennett v. Total Minatome Corp.*, 138 F. 3d 1053 (5th Cir. 1998); *Papaila v. Uniden America Corp.*, 51 F. 3d 54, 55 (5th Cir. 1995); and *Fortino v. Quasar Co.* 950 F. 2d 389, 392 (7th Cir. 1991).

A Petition for Writ of Mandate was timely presented to the California Court of Appeal and summarily denied on November 4, 2004. In addition, a Petition for Review to the California Supreme Court, following the issuance of a decision from the California Court of Appeal was also summarily rejected on December 4, 2004.

Having exhausted its appellate remedies within the State of California, and facing the continuing violation of Ricoh-USA's constitutional rights as well as the constitutional rights of its parent company, Ricoh-Japan, Petitioner filed an Application for Emergency Stay of Trial Court Proceedings with Justice O'Connor on December 3, 2004. Notwithstanding trial commencing on December 6, 2004, Justice O'Connor denied Petitioner's Application for Emergency Stay of Trial Court Proceedings on December 3, 2004.

V. REASONS FOR GRANTING THE PETITION

A. There Is a Reasonable Probability That at Least Four Members of this Court Would Conclude That this Case Warrants Plenary Consideration

There is a reasonable probability that four or more Members of this Court would vote to grant *certiorari*.

1. This Court previously granted certiorari to review a closely related case arising out of a similar dispute. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S. Ct. 2374, 72 L.Ed.2d 765 (1982). This instant case presents Constitutional issues not addressed by the *Sumitomo* decision. *See* 457 U.S. at 189. The instant Petition for a Writ of Certiorari presents related questions under Articles I and II of the United States Constitution and the Supremacy Clause of the United States Constitution.

2. This Court's review of the California Supreme Court's decision is warranted because the California Supreme Court "decided an important federal question that conflicts with relevant decisions of this Court," *U.S. Sup. Ct. R. 10(c)*. As discussed in greater detail below, this case presents important questions regarding

the Supremacy of the U. S. Constitution, Treaties and federal court cases.

3. There is a profound national interest in ensuring the stable and consistent conduct of foreign affairs and conduct of foreign commerce. This national interest also includes the promotion of investments by foreign companies in the U.S. economy as stated in these FCN Treaties. *See Art. I of the U.S.-Japan FCN Treaty, 4 U.S.T. 2063 (1953); Art. II, U.S. - France FCN Treaty, 11 U.S.T 2398 (1959); Art II, U.S. Korea FCN Treaty, 8 U.S.T 2217 (1956).*

B. Petitioners Are Likely to Prevail on the Merits

There is at least a "fair prospect" that Petitioner will prevail on the merits in this case.

1. Respondents' Claims for Discrimination are Barred by the U.S.-Japan FCN Treaty

Respondents allege Ricoh-USA discriminated against them on the basis of their "national origin and race" in violation of the Fair Employment and Housing Act ("FEHA"). (*Cal. Govt. Code §* 12940). The discrimination as alleged by Respondents, however, is

in reality Ricoh-Japan's placement of Japanese nationals – employed by Ricoh-Japan – on a temporary basis in key management and technical positions at Ricoh-USA as permitted by the Treaty of Friendship, Commerce and Navigation between Japan and the United States ("U.S.-Japan FCN Treaty"). *See, Commerce and Navigation*, April 2, 1953, U.S.-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863. Thus, Respondents' claims that this placement of Japanese citizens at Ricoh-USA discriminated against them on account of their national origin and race in violation of the FEHA simply cannot stand in the face of the U.S.-Japan FCN Treaty.

2. The Alleged Discrimination Against Respondent Is Ricoh-Japan's Temporary Assignment to Ricoh-USA of Japanese Citizens as Executives and Technical Experts in Accordance with the U.S.-Japan FCN Treaty

In 1953, the United States and Japan signed the Treaty and Protocol Between the United States of America and Japan Regarding Friendship, Commerce and Navigation ("U.S.-Japan FCN Treaty").

4 U.S.T. 2063, T.I.A.S. No. 2863. Originally intended to encourage U.S. investments abroad in Japan as it recovered from World War[4] the U.S.-Japan FCN Treaty also promotes direct investment by Japan in the United States. *Id.*

To facilitate seamless management of Japanese companies operating within U.S. boundaries, the U.S.-Japan FCN Treaty[4] recognizes the right of these companies to retain certain classes of employees, such as executives, attorneys or technical experts "of their choice." *See* U.S.-Japan FCN Treaty, art. VIII. Specifically, Article VIII(l) of the U.S.-Japan FCN Treaty provides:

> "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other *technical*

---

[4] After the Second World War, the United States negotiated Friendship, Commerce and Navigation ("FCN") treaties with over forty-eight nations to promote overseas investments by U.S. companies in countries recovering from World War II. The treaties guaranteed certain legal protections for U.S. investors abroad and, in return, guaranteed protection to foreign businesses operating in the United States. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 182 (1982) [citing Herman Walker, Jr., Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229-232 (1956)].

experts, executive personnel, attorneys, agents and other specialists of their choice."

4 U.S.C. 2063, 2070 [emphasis added].

The provision outlined in Article VIII of the U.S.-Japan FCN Treaty was included among the treaty provisions "for the limited purpose of securing to foreign investors the freedom to place their own citizens in key management positions, thus facilitating their operational success in the host country." *MacNamara v. Korean Airlines,* 863 F.2d 1135, 1144-45 (3d. Cir. 1988) [construing Article VIII(1) of the Korean FCN Treaty, which is nearly identical to that of the U.S.-Japan FCN Treaty].[5] Courts generally agree that Article VIII necessarily affords each such company the right to prefer its own citizens to those possessing U.S. citizenship. *Bennett v. Total Minatome Corp.,* 138 F. 3d 1053 (5th Cir. 1998) [construing Article

---

[5] Nevertheless, despite its limited purpose, both parties to the treaty deemed the provision, and its concomitant right to place the signatories' own nationals in managerial, technical, and confidential capacities, "to be critical." *Wickes v. Olympic Airways,* 745 F. 2d 363, 367-368 (6th Cir. 1984) (construing Article XII(4) of the Greek FCN Treaty, which contains language similar to that of the Japanese FCN Treaty).

VI of the U.S.-French FCN Treaty, which is similar to Article VIII of the U.S.-Japan FCN Treaty]; *Papaila v. Uniden America Corp.*, 51 F. 3d 54, 55 (5th Cir. 1995) [construing Article VIII(1) of the U.S.-Japan FCN Treaty]; *MacNamara,* 863 F. 2d at 1144. This is true even if the company does so as replacement for or instead of existing company personnel. *MacNamara,* 863 F. 2d at 1144. As such, "discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin or race." *Fortino v. Quasar Co.*, 950 F. 2d 389, 392 (7th Cir. 1991) [construing Article VIII(l) of the U.S.-Japan FCN Treaty].

In reliance on Article VIII(l) of the U.S.-Japan FCN Treaty, Ricoh-Japan assigns on a temporary basis several of its own managers and technical experts to work at Ricoh-USA so as to implement rapidly evolving technological developments from the parent to Ricoh-USA and ensure the quality and consistency of the products that, as such, when the need for highly specialized technical skills arises, Ricoh-USA relies on its parent to temporarily transfer individuals from Japan to the United States, which Ricoh-Japan

properly does pursuant to non-immigrant visas specifically designed for such purposes.

Consequently, to the extent Respondents, Litton and Haluck claim that Ricoh-USA-Japan's placement of Japanese citizens in positions at Ricoh-USA constitutes discrimination on the basis of national origin or race, such claims simply cannot stand given the provisions of the U.S.-Japan FCN Treaty and Ricoh-USA-Japan and Ricoh-USA's reliance thereon. *Fortino,* 950 F.2d at 392.

3. As a Subsidiary of Ricoh-Japan, Ricoh-USA May Invoke the Rights of its Parent Provided for Under the U.S.-Japan FCN Treaty

There has been much debate about what entities may properly rely upon the provision outlined in Article VIII as relates to their choice of executives and technical personnel. Indeed, according to the U.S. Supreme Court, once a Japanese corporation incorporated a U.S. domestic subsidiary, the subsidiary was technically an American corporation and thus unable to assert rights under the U.S.-Japan FCN Treaty in their own right. *Sumitomo Shoji America. Inc. v. Avagliano,* 457 U.S. 176, 189 (1982). The *Sumitomo* Court

nevertheless expressed "no view as to whether [a U.S. subsidiary] may assert any Article VIII(l) rights of its parent", and thus left open the question. *Sumitomo Shoji America. Inc. v. Avagliano,* 457 U.S. 176, 189, 190 n.19 (1982) [construing U.S.-Japan FCN Treaty, art. XXII(3)].

In the ensuing two decades since *Sumitomo* was decided, numerous federal Courts of Appeal have relied on the *Sumitomo* Court's decision, and Footnote 19 in particular, 457 U.S. at 190 n. 19, and determined that, in furtherance of the spirit and purpose of the FCN treaties, domestic subsidiaries must be permitted to assert the treaty rights of their parent. *Fortino,* 950 F. 2d at 393. *See also, Bennett,* 138 F. 3d 1053; *Papaila,* 51 F. 3d 54; *MacNamara,* 863 F. 2d 1135.

According to *Fortino* and its progeny, by distinguishing the *Sumitomo* Court's decision on the basis that, in that case, "there was no contention that the parent had dictated the subsidiary's discriminatory conduct, the Supreme Court left open the question whether the subsidiary might in such a case assert any of its parent's treaty rights." Indeed, these subsequent Court of Appeals cases

deemed the subsidiary's reliance on the treaty necessary so as "to prevent the treaty from being set at naught." *Fortino,* 950 F.2d at 393. *See also, Papaila,* 51 F.3d at 55. In addition, as all of these cases recognized, there is a vast difference between, on the one hand, a corporation asserting rights afforded under a federal treaty and thereby exerting a preference for one's own citizens so as to ensure protection of its business interests and, on the other hand, a corporate entity illegally discriminating on the basis of national origin and race. *Id.*

4. Ricoh-USA Has Third Party Standing to Invoke the Rights of Ricoh-Japan Under the Treaty

Based on the U.S. Supreme Court's opinion in *Edmonson,* a litigant "may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Edmonson,* 500 U.S. at 629. It is clear from the facts of this case that Ricoh-USA has third party standing to invoke the

rights of Ricoh-Japan under the U.S.-Japan FCN Treaty.

First, Ricoh-Japan has suffered, a concrete, redressable injury-in-fact sufficient to have a substantial stake in the outcome of this litigation. *Edmonson,* 500 U.S. at 629; *Powers v. Ohio,* 499 U.S. 399 (1991). Indeed, Ricoh-Japan's future rights to conduct business pursuant to the U.S.-Japan FCN Treaty are inextricably tied to the way in which Ricoh-USA conducts its daily business, especially should such conduct be found to be proscribed by or in conflict with the anti-discrimination statutes as alleged by Plaintiffs/Respondents. Thus, Ricoh-Japan clearly has a stake in the outcome of this case. *Id. See also, Singleton v. Wulff,* 428 U.S. 106, 113 (1976) [where party indicates it has performed in the past, and intends to perform in the future, in a way proscribed by the statute or law at issue creates controversy between the two parties at bar].

Second, as has been clearly demonstrated, *supra*, Ricoh-USA has a close relation with the third party, Ricoh-Japan, sufficient to permit Ricoh-USA to raise Ricoh-Japan's rights under the U.S.-Japan FCN Treaty. *Edmonson,* 500 U.S. at 629.

Finally, Ricoh-Japan has not been named in this action and,

as such, is unable to assert its own rights under the U.S.-Japan FCN Treaty. Hence, the parent corporation's absence requires Ricoh-USA to protect Ricoh-Japan's interests in this Court.

Therefore, the relationship between Ricoh-USA and Ricoh-Japan is such that Ricoh-USA is the only effective and recognizable proponent of Ricoh-Japan's rights under the Treaty. *Singleton,* 428 U.S. at 116.

C. Petitioner Will Suffer Irreparable Harm from the Denial of Its Petition for Certiorari and the Balance of the Equities Clearly Favors Issuance of a Stay.

Petitioner will suffer irreparable injury unless a Writ of Certiorari issues in this case. The decision of the Superior Court for the State of California, and the refusal of both the California Court of Appeal and the California Supreme Court to stay the trial court's proceedings in the face of an assault on the Supremacy Clause of the Constitution of the United States imperils and abrogates a federal treaty right protected by the Supremacy Clause. *See United States v. Michigan*, 508 F. Supp. 480, 491(D. Mich. 1980). "Where denial of fundamental interest such as constitutional rights are involved,

damage is presumed to be irreparable and a writ should issue as a matter of course." *Id.* Indeed, where a court decision prevents a party from exercising proper treaty rights, irreparable harm is presumed. *Id.*; *Mille Lacs Band of Chippewa Indians v. Minnesota*, 864 F. Supp. 102, 105 (1994), *citing with approval*, *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1506 (W.D. Wash. 1988).

In the instant case, the California trial court has declared as a matter of law that neither Ricoh-USA or its parent corporation, Ricoh-Japan, may invoke protection under the U.S. -Japan FCN Treaty in response to violations of California State Law concerning employment discrimination. Resolution of whether Ricoh-USA, a Japanese subsidiary based in the U.S. may be barred from exercising constitutional rights set forth in *Fortino*, *Bennett*, *Papaila and MacNamara*, as well as Articles I, II and VI of the United States Constitution must be immediate. This issue cannot be deferred to final resolution through a lengthy trial and appellate process that could literally take years and hundreds of thousands if not millions of dollars in costs, expenditures and consequential expenditures that have yet to be calculated.

D. In the Absence of a Writ of Certiorari Issuing from U.S. Supreme Court, U.S-based Subsidiaries of Japanese Corporations and U.S. Employees Face Eminent and Irreparable Injury.

As typically detailed in Article I or Article II of a FCN Treaty, the United States has a vital interest in encouraging foreign companies to invest in the United States economy by establishing subsidiary operations within the United States. Such investments of capital stimulate and promote jobs, economic development and economic growth of various state, local and ultimately the national economy.

Indeed, the concern of Japanese parent corporations concerning the interpretation of the U.S.-Japan FCN Treaty dates back to the briefing accepted by this very Honorable Court in the *Sumitomo* decision. *See Amicus briefs of Japanese Government, East Asiatic Company, Inc., and C. Itoh & Simple Co., Ltd.* In essence, the concern of all Japanese-based parent corporations with U.S. subsidiaries was articulated in the case of *Spiess v. C. Itoh & Simple Co.*, 643 F. 2d 353, 358-361 & n.2 (5th Cir. 1979). In *Spiess*,

the court declared:

> "Considering the Treaty as a whole, the only reasonable interpretation is that Article VIII (1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."

Therefore, to allow the trial court decision to stand with respect to Petitioner, violates a fundamental principal of Treaty interpretation in that a Treaty is to be liberally construed to accomplish its overriding purpose. *See*, e.g., *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Nielsen v. Johnson,* 279 U.S. 47 (1929); *Jeofrey v. Riggs*, 133 U.S. 258 (1890).

Indeed, the court has traditionally construed commercial treaties in an expansive manner, both in determining the parties entitled to claim treaty protection in the means by which those parties exercise their treaty rights. *Kolovret v. Oregon,* 366 U.S. 187 (1961); *Jordon v. Tashiro*, 278 U.S. 123 (1928).

If Japanese corporations cannot control their investments in

U.S. based subsidiaries ***based upon their reasonable expectations*** derived from a plain reading of he U.S.-Japan FCN Treaty, then the entire economic relationship between United States and Japan may become unequivocally altered and disrupted.

X. CONCLUSION

Under these circumstances, the effect of a failure to issue of Writ of Certiorari could well disrupt the economic infrastructure of the United States and potentially create a diplomatic crisis between the United States and Japan. Thus a Review by this Honorable Court is justified by the extraordinary importance of the outcome of this case and the extremely time sensitive nature of relief.

DATED:February 24, 2005

Respectfully submitted,
CALLAHAN & BLAINE

By: _____

DANIEL J. CALLAHAN
KONRAD L. TROPE
CALLAHAN & BLAINE, APLC
3 Hutton Centre Drive, Suite 900
Santa Ana, CA 92707
Telephone: (714) 241-4444
Facsimile: (714) 241-4445

Brief filmed in entirety as printed.

Supreme Court, U.S.
FILED

041162 JAN 26 2005

OFFICE OF THE CLERK

(2)

COPY

No.

IN THE

Supreme Court of the United States

RICOH ELECTRONICS, INC.,

Petitioners,

v.

JAMES HALUCK and MICHAEL LITTON,

Respondents.

On Petition for Writ of Certiorari
To The Court of Appeal, Fourth Appellate District, Division Three, in the Supreme Court of California

---

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

VOLUME 1

Daniel J. Callahan
Konrad L. Trope
Counsel of Record
CALLAHAN & BLAINE, APLC
3 Hutton Centre Drive, Suite 900
Santa Ana, California 92707
(714) 241-4444
(714) 241-4445 (facsimile)

Counsel for Petitioner

No.

IN THE
Supreme Court of the United States

RICOH ELECTRONICS, INC.,

Petitioners,

v.

JAMES HALUCK and MICHAEL LITTON,

Respondents.

On Petition for Writ of Certiorari
To The Court of Appeal, Fourth Appellate District, Division Three, in the Supreme Court of California

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

VOLUME 1

Daniel J. Callahan
Konrad L. Trope
Counsel of Record
CALLAHAN & BLAINE, APLC
3 Hutton Centre Drive, Suite 900
Santa Ana, California 92707
(714) 241-4444
(714) 241-4445 (facsimile)

Counsel for Petitioner

APPENDIX

INDEX OF EXHIBITS TO THE FILING OF A PETITION

FOR WRIT OF CERTIORARI

TO THE CALIFORNIA SUPREME COURT

Volume	Tab	Document Description
1	1	Supreme Court of California, Order
1	2	California Court of Appeals, Fourth Appellate District, Order
1	3	Superior Court of California, County of Orange, Tentative Rulings on Law & Motion Matters for Judge Brooks, Dept. C-12; September 29, 2004
1	4	Order Issued on September 29, 2004 by the Honorable James M. Brooks
1	5	Order Partially Denying and Partially Granting Defendants' Motions for Summary Judgment or, in the Alternative, Summary Adjudication of Issues

1	6	California Code of Civil Procedure § 437 (c) - Summary Judgment
1	7	California Government Code § 12940 - Unlawful Employment Practices
1	8	California Labor Code § 970 - Influencing, Persuading or Engaging Worker to Change from One Place to Another by False Representations
1	9	Title 8 United States Code § 1101 - Aliens and Nationality; Immigration and Nationality General Provisions
1	10	11 United States Treaty 2398 - U.S. Treaty with France; Establishment; TIAS 4625
1	11	8 United States Treaty 2217 - U.S. Treaty with Republic of Korea; Friendship, Commerce and Navigation; TIAS 3947
1	12	5 United States Treaty 1829 - U.S. Treaty with Greece; Friendship, Commerce and Navigation; TIAS 3057

1	13	4 United States Treaty 2063 - U.S. Treaty with Japan; Friendship, Commerce and Navigation; TIAS 2863
1	14	Superior Court of California, County of Orange, Honorable James M. Brooks, Judge Presiding, Reporter's Transcript of Proceedings for September 29, 2004

Court of Appeal, Fourth Appellate District,
Division Three - No. G034618
S128890

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RICOH ELECTRONICS, Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF ORANGE, Respondent

JAMES HALUCK et al., Real Parties in Interest

Application for stay and petition for review DENIED.

SUPREME COURT
FILED

NOV 4 - 2004

Frederick K. Ohlrich Clerk
DEPUTY

s/ George
Chief Justice

RECEIVED
NOV - 8 2004
LMFT&M SAN DIEGO

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

RICOH ELECTRONICS, INC. et al., Petitioners, v. SUPERIOR COURT OF THE COUNTY OF ORANGE, Respondent JAMES HALUCK et al., Real Parties in Interest	G034618 (Super. Ct. No. 03CC10166) **ORDER**

THE COURT: *

The petition for a writ of mandate and request for immediate stay are DENIED. Petitioners have an adequate remedy at law.

S/ RYLAARSDAM, J

RYLAARSDAM, ACTING P. J.

COURT OF APPEAL - 4TH DIST DIV 3
FILED

OCT 21 2004

Deputy Clerk _____

* Before Rylaarsdam, Acting P. J., Moore, J., and Fybel, J.

BEST AVAILABLE COPY

Superior Court of California
County of Orange

TENTATIVE RULINGS ON LAW & MOTION MATTERS

JUDGE BROOKS, DEPT. C12 - CIVIL

DATE: SEPTEMBER 29, 2004 3:00 P.M.

The Court will make a reasonable effort to post Tentative Rulings on the Internet on Law & Motion matters by 10:00 a.m. on the day of the hearing (often sooner). Hearings are at 3:00 p.m. on Wednesdays. The Internet address is http://www.occourts.org/rulings/brooks.asp Tentatives will also be posted on the bulletin board outside the courtroom prior to the hearing.

Any party that chooses to submit the matter based upon the Court's tentative ruling should contact the opposing party. If all parties agree to submit, then one party should call and advise the Court Clerk at (714) 834-3750. No appearances will then be required.

CASE #	CASE INFO.	TENTATIVE RULING
7	**03CC10166** **HALUCK** **VS. RICOH** **ELECTRON** **ICS INC.**	THIS COURT WAS DELIGHTED TO SEE THE NINE MOTIONS FILED BY DEFENDANT'S HERE. SPACE LIMITATIONS PRECLUDE THE POSTING OF THE COURT'S ANALYSIS OF NINE MOTIONS SO WE WILL ENDEAVOR TO FAX THE ANALYSIS SUMMARY TO COUNSEL ASAP ON WEDNESDAY MORNING. IN THE MEANTIME, THE COURT'S RULINGS ON THE MOTIONS ARE AS FOLLOWS: **MOTION #1 -** **DENY SUMMARY JUDGMENT** **DENY SUMMARY ADJUDICATION OF ISSUES AS TO CAUSES OF ACTION 6-7, 9.**

		MOTION #2 - **DENY SUMMARY JUDGMENT** **DENY SUMMARY ADJUDICATION OF ISSUES AS TO CAUSES OF ACTION 1-4, 8.** **MOTION #3, 5, 7, 9 -** **DENY SUMMARY JUDGMENT** **DENY SUMMARY ADJUDICATION OF ISSUES AS TO ALL DEFENDANT'S ON 2ND AND 8TH CAUSES OF ACTION.** **GRANT SUMMARY ADJUDICATION OF ISSUES AS TO ALL DEFENDANT'S ON 9TH CAUSE OF ACTION.**

		MOTIONS #4, 6, 8 - GRANT **SUMMARY JUDGMENT AS TO VAUGH (#4) AND JURID (#8)** **DENY SUMMARY JUDGMENT AS TO NOMURA (#6)** **GRANT SUMMARY ADJUDICATION OF ISSUES AS TO NOMURA ON 9TH CAUSES OF ACTION.** **DENY SUMMARY ADJUDICATION OF ISSUES AS TO NOMURA ON 2ND AND 8TH CAUSES OF ACTION** MOVING PARTIES TO GIVE NOTICE

Return To Orange County Superior Court Home Page

County of Orange Website

09-29-04 09:25am +7148346171 T-505 F-439

From - SUPERIOR COURT OF CA, COUNTY OF ORANGE

FAX TRANSMISSION

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

THE GREAT SEAL
OF THE
STATE OF CALIFORNIA

700 Civic center Drive West
Santa Ana, CA 92701
Phone (714) 834-5810
Fax (714) 834-6171

To: Denise Visconti **Date:** 9 - 29-04

Fax: (619) 232-4302 **Pages:** 7

From: C-12 Judge Brooks [Pages (including cover sheet)]

Phone #: (714) 834-3750

Comments:

Confidential Document: Yes √ No ___

If you fail to receive all ___ Pages of this transmission including cover, please contact the Central Justice Center at (714)834-5810

Motion #1 - Δ REI vs π Haluck

Issue # 1 - Δ REI contends the 1st c/a is barred by the US-Japan Treaty of Friendship, Commerce and Navigation. The c/a is also barred by Δ's "bona fide occupational qualification" defense, is time-barred and fails as a matter of law.

(Note that Δ's format is not in compliance with CRC 342(h), in that Δ asserts various theories on which 1st c/a is barred, but combines them all in a single issue in the sep state. Due to this defect of format, a finding of any triable issue, say on the occupational qualification defense, would result in denial of SAI as to the 1st c/a, regardless of the other theories. This is analogous to finding that a defective SAI motion will be treated solely as one for SJ. This procedural defect is repeated throughout all 9 motions).

As to the treaty issue, Δ argues that although the only California

case on point, Kirmse 51 CA 4th 311, 321, held that the treaty applies only to Japanese companies operating in the US (and US companies in Japan) and not to subsidiaries of the Japanese company, there is much Federal precedent (cited at pg 11 of the motion) to the contrary. Deny, apply California law and find that REI may not invoke the treaty.

As to the "bona fide occupational qualification" defense, Δ claims that the subject occupations (to which π's were not promoted) require an advanced level of expertise and proprietary knowledge of REI processes and an ability to speak Japanese, deny SAI. There are triable issues of fact whether the people promoted to the positions were more qualified than πs and whether the ability to speak Japanese was a job requirement. See Sep State at # 1, 2, 6, 12.

Δ argues that "part" of π's 1st c/a is time barred, but as π points out, SAI must dispose of the entire c/a. Δ submits no authority for the partial adjudication of a claim. This alone supports denial. Further, there is a triable issue of fact whether the "continuing

violation" doctrine applies, so as to toll the accrual of the S/L. Δ again cites to Federal law construing Title VII, that where there are discrete/independent discriminatory acts, such as failure to promote, each act represents a separate and potentially actionable employment practice (see pg 19: 19-21 of the motion). Under Calif law, Richards 26 Cal 4th 798, the Continuing Violation Doctrine will toll the S/L where there are similar kinds of employer conduct, which has occurred with reasonable frequency, and has not acquired a degree of permanence.

Δ also argues the discrimination claim falls as a matter of law because π can't show a discrimination claim fails as a matter of law because π can't show a discriminatory motive, but here there is both direct evidence and circumstantial evidence of discriminatory motive, see π's decl.

Issue # 2 - The 2nd c/a for retaliation is partially time-barred and π can't establish a prima facie case of retaliation.

The partially time-barred argument fails here for the same reason as on issue # 1. Further, there is a triable issue of fact whether

repeated acts of retaliation are tolled under the continuing violation doctrine. See sep stat at # 41, 45, re the last act occurring within the S/L and # 45 as evidence of retaliation. As to the argument re establishing a prima facie case re retaliation, there are issues of fact as to whether Δ's giving Nguyen the director's title was too remote in time (10 months) to constitute a causal relation between the acts, and whether π's title change was a "substantial" and "material adverse effect" on π's employment.

Issue # 3 - 3rd c/a for Failure to Prevent Discrimination fails. Δ takes the position here that since there was no discrimination, there can be no c/a for failure to protect discrimination. But since there are disputed facts re discrimination occurring, see Issue # 1, this SAI must be denied. There is also issue of fact as to whether π H followed Δ's "Employer Problem Resolution Policy. See sep stat at 60.

Issue # 4 - The 4th c/a for adverse employment action in Violation of Public Policy is Partially time-barred and fails as a

matter of law because π can't establish either discrimination or retaliation.

The partially time-barred argument fails, no partial adjudication as to events remote in time. Further, though Δ argues for application of the 1 yr S/L under CCP 340(3), the CCP 335.1 S/L is 2 yrs and took effect 1-1-03. Although it can't "revive" stale claims, this action was filed Aug 03, and the last failure to promote complained of was in 6/02, within 2 yrs. See sep state at # 67, 68.

As to the argument that π"s failure to establish discrimination or retaliation bars any public policy violation c/a, there are triable issues as to discrimination (see Issue # 1), that creates triable issue here.

Issue #5 - 6th c/a for Br of Express and Implied Contract

Δ contends that π H was an at-will employee. See Sep State at # 70, 71, 72,75,76. π evidence is insufficient to raise triable issues of fact, comments of employees are not sufficient to overcome numerous written documents relied upon by Δ, grant SAI as to

the 6th c/a.

Issue # 6 - 7th c/a for Br of GFFD cannot lie where there is no employment K.

Granted based upon granting of prior issue # 5, as the 7th c/a must be based on enforceable K, π evid is insufficient to find enforceable K.

Issue # 7 - 8th c/a for IIED is barred by 1yr S/L, and because Δ's conduct is not outrageous as a matter of law, and because the conduct is work-related and barred by the exclusivity provisions of Worker's Compensation.

Δ again seeks "partial summary judgment" for conduct allegedly time-barred, but submits no authority in support of this procedure. Further, as argued previously, the 1yr S/L of CCP 335.1 was extended to 2 yrs in Jan 03; the 2 yr S/L applies.

Δ concedes that the work comp exclusivity rule doesn't bar suits for emotional distress damages resulting from discriminatory or retaliatory conduct, but contends π H has failed to establish discrimination or retaliation. As noted above, there are triable issues as to both discrimination and retaliation, so there is triable

issue as to whether Δ's conduct is outrageous and whether π's action is barred by work comp exclusivity rule.

Issue # 8 - 9th c/a for NIED is time-barred by the 1yr S/L, because intentional acts don't constitute negligence and are barred by the exclusivity provisions of work comp.

The 1 yr S/L doesn't apply, see prior analysis. Nor does work comp exclusivity bar the action, as there are triable issues of fact π H can establish racial discrimination or retaliation.

But granted on basis of Semore 217 CA 3rd 1087, 1105 and Cole 43 Cal 3rd at 160, which hold that an employer's supervisory conduct is inherently intentional thus ti won't support a c/a for IIED and NIED claims were submitted to jury, but this particular issue wasn't raised in that case, and π fails to distinguish Semore and Cole.

Motion # 2 - Δ REI vs π Litton

This SJ by REI v. π Litton largely mirrors the same issues asserted in Motion # 1 against π H. Where the issues are the same, the work-up will refer back to the prior motion.

Differences will be addressed. Note that the 5th c/a for Labor Code 970 violations is asserted solely by π L.

Issue # 1 - (same as Mot # 1 - Iss # 1) The 1st c/a for discrimination id barred by the Treaty., by the Occupational Qualification Defense, and is time-barred.

Rec is to deny SAI. As to arguments concerning the treaty, see mot # 1, i.e., the treaty doesn't apply to subsidiaries and there are triable issues as to th "bona fide occupational qualification" defense. See sep stat at facts # 1,2,6,12.

Re the time-bar argument, π L complains of different events that π H, was passed over for Manager for Director of Engineering between 1996 and 98, and for QES dept in Apr 01. (¢ at par 21-35). But as on prior motion, partial SJ is not allowed and CCP 335.1 S/L of 2 yrs applies. Further, there is triable issue of fact whether the Continuing Violation Doctrine tolls the S/l.

π L was terminated on 1-2-02, filed admin ¢ with DFEH on 11-15-02, and filed this ¢ on 8-12-03.

Δ again argues that π L fails as a matter of law to establish

discrimination claim. Δ claims the only discriminatory act during the limitations period was π L's layoff, but since there are triable issues re the application of the continuing violation doctrine, ct. will deny SAI on this ground. Δ also argues there was good cause for the layoff, this is triable issue of fact, see sep state # 44.

Issue # 2 - The 2nd c/a for retaliation is partially untimely and there is no causal nexus between π L's protected conduct and his failure to obtain promotions or decisions to lay off.

Denied as to partially untimely argument, also denied based on factual issues concerning the application of the continuing violation doctrine.

As to causal connection being too remote, Δ contend that because π L's last complaints were made in Apr 01, and his layoff didn't occur until 7 months later in Jan 02, that π's protected conduct is too remote in time for a claim of retaliation Breeden 532 US 267 (citing Richmond 120 F 3rd 205, 209). Here, ct. will treat the question of whether events are sufficiently

contemporaneous as triable issue of fact.

Δ also claims legitimate grounds to lay off π L, but there is triable issue of fact, see sep state at #) (same as # 44 on mot # 1).

Issue # 3 - The 3rd c/a for failure to prevent workplace discrimination fails.

This issue is the same as Issue # 3 on mot # 1, deny for same reasons, i.e., there are disputed facts re whether discrimination occurred, an whether π L complied with Δ policy re discriminatory complaints, see sep stat at # 65-67.

Issue #4 - 4th c/a for adverse employment action in violation of public policy is time-barred and fails because π can't establish discrimination or retaliation.

Δ repeats argument that the 1 yr S/L applies, but the 2 yr S/L of CCP 335.1 applies. Δ also claims that π L has failed to establish discrimination/retaliation, but there are triable issues as to whether discrimination occurred (see Issue # 1).

Issue # 5 - 5th c/a for Violation of Labor Code 970 fails because

not filed within 1 yr and because π L fails to establish he detrimentally relied on misrepresentations.

This is a statutory claim against an employer for knowingly making false representations. The representations were made when π L offered employment in May/June 96. Δ cites Murray 156 CA 3rd 965, 980, for contention that S/L is 1 yr. π relies on Aguilera 223 F 3rd 1010 for contention that a worker's claim for knowingly false representations accrued on the date they were discharged. For π L, that date is 1-2-02, and his ¢ was filed 8-12-03. Although π notes that the Aguilera ct also applied the 1 yr S/L, it expressed doubt whether this was correct. π seeks to apply the 3 yr S/L for statutory violations in CCP 338. Rec is grant, applying the 1 yr S/L used by authorities for both parties. π's c/a is time-barred.

Issue # 6 - 6th c/a for Br of K fails because π was an at-will employee.

As on mot # 1, Issue 5, Δ contends based on handbook and other

docs, that π was an at-will employee. See sep state at # 80, 82, 84, 85. π L relies on the same insufficient evid as π H in trying to create triable issues of fact. Rec is to grant SAI.

Issue # 7 - 7th c/a for Br of GFFD fails because there is no employment K.

Grant SAI - This c/a fails due to SAI being granted on Issue # 6, there is no enforceable K on which to base c/a.

Issue # 8 - The 8th c/a for IIED fails because π L neglected to file his ¢ within 1 yr S/L and because employment actions don't rise to the level of outrageous conduct.

Deny for same reasons as Issue # 7 in Mot # 1, i.e., the 2 yr S/L of CCP 335.1 applies and there are triable issues of fact whether discrimination or retaliation occurred and thus there is question whether this is normal part of work environment and barred by work comp exclusivity.

Issue # 9 - The 9th c/a for NIED is time-barred and fails because intentional torts can't sustain a c/a for negligence.

Deny as to theory of time-bar based on 1 yr S/L, see prior analysis.

Grant as to NIED based on Semore 217 CA 3rd 1087, 1105, and Cole 43 Cal 3rd at 160, that acts of supervisors are inherently intentional and can't support a c/a for NIED.

Motion # 3 - Δ Vaughn vs π Haluck

Motion # 5 - Δ Nomura vs π Haluck

Motion # 7 - Δ Uesaka vs π Haluck

Motion # 9 - Δ Ide vs π Haluck

These motions are addressed together, as Δs have submitted a combined separate statement in support of these 4 motions, it is attached to motion # 3, see yellow tab "§§ 3".

Motions # 3,5,7,9 are for SJ or SAI as to each of the 3 c/as asserted against the individual Δs:

-2nd c/a - Retaliation

-8th c/a - IIED

-9th c/a - NIED

As to all Δs, SAI as to the 9th c/a for NIED should be granted for same reasons it was granted as to Δ REI.

As to 2nd and 8th c/a, rec is to deny SAI as to all Δs, and this

despite the feeling that π has no significant evidence against any of these individual Δs that they retaliated against or committed outrageous acts against π H. But Δs as MP have the burden of proof. Yet, as to the acts complained of in 1995, there is no evidence that Δs Vaughn, Nomura and Ide did not participate in this decision, which may not be time-barred if continuing violation doctrine is found to apply.

As to Δ Uesaka, although there is evid he didn't arrive until 2001, there is evid he participated in the promotion of Nguyen to Director of engineering in 2002. This could be evid of retaliation and discrimination, could constitute outrageous conduct. See sep state at # 4, 6,9,10.

Motion # 4 - Δ Vaughn vs π

Michelle A. Reinglass, Esq. (SBN 86675)
John Y. Igarashi, Esq. (SBN 180118)
LAW OFFICES OF MICHELLE A. REINGLASS
23161 MILL CREEK DRIVE, SUITE 170
Laguna Hills, CA 92653
Tel: (949) 587-0460
Fax: (949) 587-1004

FILED
Superior Court of California
County of Orange
Central Justice Center

Attorneys for Plaintiffs, JAMES HALUCK and MICHAEL LITTON

NOV 08 2004
Alan Slater, Clerk of the Court
s/ N. Caughlin

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

JAMES HALUCK and MICHAEL LITTON, Plaintiffs, vs. RICOH ELECTRONICS, INC., a California corporation; LARRY VAUGHN, an individual; HARUO UESAKA, an individual; YOJI IDE, an individual; YASUAKI MURAMATSU, an individual, YOSHIHIRO NOMURA, an individual; HOUSSAM EL JURDI, an individual ; and DOES 1 through 10, Inclusive, Defendants.	Case No. 03CC10166 Assigned for All Purposes to: Hon. James M. Brooks Department C-12 [Proposed] Order Partially Denying and Partially Granting Defendants' Motions for Summary Judgment or in the Alternative, Summary Adjudication of Issues Date: September 29, 2004 Time: 3:00 p.m. Dept: C-12 Complt. Filed Aug 12, 2003 Trial Date: Nov. 8, 2004

The nine Motions for Summary Judgment filed by Defendants came on regularly or hearing on September 29,2004 at 3:OO p.m., in Department C- 12 of the Orange County Superior Court, Central Justice Center. Michelle A. Reinglass, Esq. and John Y. Igarashi, Esq. of the Law offices of Michelle A. Reinglass appeared on behalf of Plaintiffs. Kenneth Rose, Esq. of Littler Mendelsoh appeared on behalf of all appearing Defendants. After full consideration of the evidence and points and authorities and the Separate Statements submitted by all parties, and oral argument of counsel, the Court ruled in the following manner:

Motion No. 1 - Defendant REI vs. Plaintiff Haluck

Issue No. 1 - Denied

Defendant REI contends the First Cause of Action is barred by the US-Japan Treaty of Friendship, Commerce and Navigation. Defendants also contend that the cause of action is also barred by Defendants 's "bona fide occupational qualification" defense, is time-barred and fails as a matter of law.

The format of Defendant's Motion is not in compliance with California Rules of Court 342(h), in that Defendant asserts various theories on which First Cause of Action is barred, but combines them all in a single issue in the Separate Statement. Due to this defect of format, a finding of any triable issue, e.g., on the occupational qualification defense, would result in denial of summary adjudication of issues as to the First Cause of Action, regardless of the other theories. This is analogous to finding that a defective summary adjudication of issues motion will be treated solely as one for summary judgment. This procedural defect is repeated throughout all 9 motions.

As to the treaty issue; Defendants argues that although the only California case on point, Kirmse v. Hotel Nikko of San Francisco. Inc. (1996) 51 Cd.4th 3 11,321, held that he treaty applies only to Japanese companies operating in the US (and US companies in Japan) and not to subsidiaries of the Japanese company, there is Federal precedent (cited at page 11 of Defendant's motion) to the contrary. The Court denies Defendant's Motion, applies California law, and finds that REI cannot invoke the treaty.

As to the "bona fide occupational qualification" defense, Defendant claims that the subject occupations (to which plaintiffs were not promoted) require an advanced level of expertise and proprietary knowledge of REI processes and an ability to speak Japanese. The Court denies summary adjudication on this point. There are triable issues of fact whether the people promoted to the positions were more qualified than plaintiffs and whether the ability to speak Japanese was a job requirement. See Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment, Fact Nos. 1, 2, 6, 12. [Haluck's Evidence, Fact Nos. 1,2]: Declaration of Haluck, paragraphs 5-8; [Haluck's Evidence, Fact No. 61: Declaration of Haluck, paragraphs 12-14. [Haluck's Evidence, Fact No. 121: Nguyen Deposition, vol. 1, 196:15-23 (Ex. 19 to Declaration of Rachel Goldstein Re Lodgment of Evidence -Haluck); Walsh Deposition, vol. 1, 160:23-161:21, 162:17-25, 165:25-:65:5 (Ex. 14 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck); El Jurdi Deposition, vol. 2,265:22-23 (Ex. 20 to Declaration of Rachel Goldstein Re Lodgment of Evidence - Haluck); Walsh Deposition, vol. 1, 158:20- 159:6 (Ex. 14 to

Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck).

Defendant argues that "part" of Plaintiffs First Cause of Action is time barred, but as Plaintiff points out, summary adjudication of issues must dispose of the entire cause of action. Defendant submits no authority for the partial adjudication of a claim. This alone supports denial.

Further, there is a triable issue of fact whether the "continuing violation" doctrine applies, so as to toll the accrual of the statute of limitations. Defendant again cites to Federal law construing Title VII, that where there are discrete/independent discriminatory acts, such as failure to promote, each act represents a separate and potentially actionable employment practice (see pages 19: 19-2 1 of Defendant's motion). Under California law, Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, the Continuing Violation Doctrine will toll the Statute of limitations where there are similar kinds of employer conduct, which has occurred with reasonable frequency, and has not acquired a degree of permanence.

Defendant also argues the discrimination claim fails as a matter of law because Plaintiff can't show a discriminatory motive,

but here there is both direct evidence and circumstantial evidence of discriminatory motive. Seen in Plaintiffs declaration, reflected in Plaintiffs Separate Statement of Evidence, Fact Nos. 1-29. [Haluck's Evidence, Fact Nos. I -29. [Haluck Declaration, paragraphs. 2 - 22; Haluck Declaration Exhibits. "1" - "11"; William Nguyen Deposition Pages 73: 4-19; 78:4-17;116:3-117:20; 123:2-5; 125:2-6.

Issue No. 2 - Denied

Defendant contends that the Second Cause of Action for retaliation is partially time-barred and Plaintiff cr mot establish a prima facie case of retaliation. The partially time-barred argument fails here for the same reason as on issue No. 1. Further, there is a triable issue of fact whether repeated acts of retaliation are tolled under the continuing violation doctrine. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 41, 45, re the last act occurring within the statute of limitations and No. 45 as evidence of retaliation. Haluck's Evidence, Fact No. 45]: Ex. 28. to Declaration of Rachel Goldstein Re Lodgment of Evidence in Support of MSJ - Haluck.

As to the argument re establishing a prima facie case re retaliation, there are triable issues of fact as to whether Defendant's giving Nguyen the director's title was too remote in time (10 months) to constitute a causal relation between the acts, and whether Plaintiff s title change was a "substantial" and "material adverse effect" on Plaintiff's employment.

Issue No. 3 - Denied

Defendant contends that Plaintiffs Third Cause of Action for Failure to Prevent discrimination fails.

Defendant takes the position here that, since there was no discrimination Defendant's contention), there can be no cause of action for failure to prevent discrimination. But since there are disputed facts re discrimination occurring, see Issue No. I, this summary adjudication of issues must be denied. There is also issue of fact as whether Plaintiff Haluck followed Defendant's "Employer Problem Resolution Policy." See Plaintiffs' Separate Statement in Opposition to Motion for Summary Judgment at Fact No. 60. [Haluck's Evidence, Fact No. 60]: Haluck Deposition, vol. 1,

18:16-20:2; 24:13-24; Ex. 21 to Declaration of Rachel Goldstein Re Lodgment of Evidence in Support of MSJ-Haluck.

Issue No. 4

Defendant contends that Plaintiff's Fourth Cause of Action for Adverse Employment Action in Violation of Public Policy is partially time-barred and fails as a matter of law because Plaintiff can't establish either discrimination or retaliation (Defendant's contention).

The partially time-barred argument fails, no partial adjudication as to events remote in time. Further, though Defendant argues for application of the one year statute of limitations under CCP 340(3), the CCP 335.1 statute of limitations is two years and took effect January 1, 2003. Although it can't "revive" state claims, this action was filed August 2003, and the last failure to promote complained of was in June, 2002, within two years. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 67, 68. [Haluck's Evidence, Fact No. 67]: Ex. 3, Ex. 28 to Declaration of Rachel Goldstein Re Lodgment of

Evidence-Haluck; [Haluck's Evidence, Fact No. 68]: Haluck Deposition, Vol. 2, 153:22- 154:15; 151:24-152:1, 153:1 -13,154:13-15.

As to the argument that Plaintiffs failure to establish discrimination or retaliation bars any public policy violation cause of action, there are triable issues as to discrimination (see Issue No. 1), that creates triable issues here.

Issue No. 5 - Granted

Sixth Cause of Action for Breach of Express and Implied Contract.

Defendant contends that Plaintiff was an at-will employee. See Defendant's Separate Statement at Fact Nos. 70, 71, 72, 75, 76. [Haluck's Evidence No. 70,71,72, 75,76]: Haluck's Response to Form Interrogatory No. 50.2; Haluck's Response to Employment Form Interrogatory No. 200.2(a); Ex. 25 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck; Bates stamp Nos. D0062-0073. Plaintiffs evidence is insufficient to raise triable issues of fact, comments of employees are not sufficient to overcome

numerous written documents relied upon by Defendant. The Court grants summary adjudication of issues as to the Sixth Cause of Action.

Issue No. 6 - Granted

Defendant contends that Plaintiff's Seventh Cause of Action for Breach of Good Faith and Fair Dealing cannot lie where there is no employment contract.

Granted based upon granting of prior issue No. 5, as the Seventh Cause of Action must be based on an enforceable contract. Plaintiff's evidence is insufficient to find an enforceable contract.

Issue No. 7 - Denied

Defendant contends that Plaintiffs's Eighth Cause of Action for Intentional Infliction of Emotional Distress is barred by one year statute of limitations, because Defendants's conduct is not outrageous as a matter of law, and because the conduct is work-related and barred by the exclusivity provisions of Worker's Compensation.

Defendant again seeks "partial summary judgment" for conduct allegedly time-barred, but submits no authority in support of this procedure. Further, as argued previously, the one year statute of limitations of CCP 335.1 was extended to two years in January 2003; the two years statute of limitations applies.

Defendant concedes that the workers compensation exclusivity rule does not bar suits for emotional distress damages resulting from discriminatory or retaliatory conduct, but contends Plaintiff Haluck has failed to establish discrimination or retaliation. As noted above, there are triable issues as to both discrimination and retaliation, so there is triable issue as to whether Defendant's conduct is outrageous and whether Plaintiff's action is barred by workers compensation exclusivity rule.

Issue No. 8-Granted

Defendant contends that Plaintiffs Ninth Cause of Action for Negligent Infliction of Emotional Distress is time-barred by the one year statute of limitations, because intentional acts don't constitute negligence and are barred by the exclusivity provisions of workers

compensation.

The one year statute of limitations doesn't apply, see prior analysis. Nor does workers compensation exclusivity bar the action, as there are triable issues of fact Plaintiff Haluck can establish racial discrimination or retaliation.

But granted on basis of Semore v. Pool (1990) 217 Cal App.3d, 1087,1105 and Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal.3d, 148, 160, which hold that an employer's supervisory conduct is inherently intentional thus it won't support a cause of action of negligent infliction of emotional distress. Plaintiff relies on Maynard 37 F.3d 1396, 1 405- 1406, where both intentional infliction of emotional distress and negligent infliction of emotional distress claims were submitted to jury, but this particular issue wasn't raised in that case, and Plaintiff fails to distinguish Semore and Cole.

Motion No. 2 - Defendant REI v. Plaintiff Litton

This summary judgment by REI vs. Litton largely mirrors the same issues asserted in Motion No.1 against Plaintiff Haluck. Where

the issues are the same, the ruling will refer back to the prior motion. Differences will be addressed. Note that the Fifth Cause of Action for Labor Code section 970 violations is asserted solely by Plaintiff Litton.

Issue No. 1 - Denied- (same as Motion No.1 - Issue No.1)

Defendant contends that the First Cause of Action for Discrimination is barred by the Treaty, by the Occupational Qualification Defense, and is time-barred.

The Court denies summary adjudication of issues. As to arguments concerning the treaty, see Motion No. 1, i.e., the treaty doesn't apply to subsidiaries and there are triable issues as to the "bona fide occupational qualification" defense. See Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 1,2,6, 12. [Litton's Evidence, Fact Nos. 1 and 2]: Declaration of Litton, paragraphs 4, 5,6,7; [Litton's Evidence, Fact No. 61: Declaration of Litton, paragraphs 11,12, 13; [Litton's Evidence, Fact No. 12] Nguyen Deposition, vol. 1, 196: 15-23 Ex. 18 to Declaration of Rachel Goldstein Re Lodgment of Evidence in

Support of Plaintiff Michael Litton's Opposition to MSJ); El Jurdi Deposition, vol. 2, 265:22-23; (Ex. 17 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Litton); Walsh Deposition, vol. 1, 158:20-159:6; 160:23-161:21, 162:17-25, 165:25-166:5 (Ex 23 to Declaration of Rachel Goldstein Re Evidence in Support of Plaintiff Michael Litton's Opposition to MSJ).

Regarding the time-bar argument, Plaintiff Litton complains of different events than Plaintiff Haluck, was passed over for Manager or Director of Engineering between 1996 and 1998, and for QES department in April 2001 (Complaint at paragraphs 21-35). But, as on prior motion, partial summary judgment is not allowed and CCP 335.1 statute of limitations of 2 years applies. Further, there is triable issue of fact whether the Continuing Violation Doctrine tolls the statute of limitations. Plaintiff Litton was terminated on January 2,2002, filed administrative complaint with the Department of Fair Housing and Employment on November 15,2002, and filed this complaint on August 12, 2003.

Defendant again argues that Plaintiff Litton fails as a matter of law to establish discrimination claim. Defendant claims the only

discriminatory act during the limitations period was Plaintiff Litton's layoff, but since there are triable issues re the application of the continuing violation doctrine, the Court denies summary adjudication of issues on this ground. Defendant also argues there was good cause for the layoff. This is a triable issue of fact, see Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment, Fact No. 44. [Litton's Evidence, Fact No. 441: Litton Declaration., par. 16; Morrissey Deposition, 112i20-113:3; Ex. 8 to Declaration of Rachel Goldstein in Re Lodgment of Evidence-Litton.

Issue No. 2 - Denied

Defendant contends the Second Cause of Action for Retaliation is partially untimely and there is no causal nexus between Plaintiff Litton's protected conduct and his failure to obtain promotions or decisions to lay off.

The Court Denies Defendant's motion as to the partially untimely argument, and also denies Defendant's motion based on factual issues concerning the application of the continuing violation doctrine.

As to the causal connection being too remote, Defendant contends that because Plaintiff Litton's last complaints were made in April 2001, and his layoff didn't occur until seven months later in January 2002, that Plaintiffs protected conduct is too remote in time for a claim of retaliation. Clark County School Dist. v. Breeden (2001) 532 US 267 (citing Richmond v. V. ONEOK, Inc. (l0th Cir. 1997) 120 F.3d 205,209). Here, the Court will treat the question of whether events are sufficiently contemporaneous as triable issue of fact.

Defendant also claims legitimate grounds to layoff Plaintiff Litton, but there is triable issue of fact. See Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment, at Fact No. 60 (same as No. 44 on Motion No. 1). [Litton's Evidence, Fact No. 60 - same as No. 44 of Haluck's evidence]: Uesaka Deposition, v. 1, 87:24-88:8; 87:9-19.

Issue No. 3 - Denied

Defendant contends that Plaintiffs Third Cause of Action for Failure to Prevent Workplace Discrimination fails.

This issue is the same as Issue No. 3 on Motion No. 1. The Court denies Defendant's Motion for the same reasons, i.e., there are disputed facts regarding whether discrimination occurred, and whether Plaintiff Litton complied with Defendant's policy regarding discriminatory complaints. See Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 65-67. [Litton's Evidence, Fact Nos. 65-67]: Litton Deposition, vol. 1, 101:3-15, 108:10-25, 109:18-110:11, 114:20-25, 115:7-19, 116:19-117:15, 120:17-21, 121:25-122:3, 125:14-126:14 (Ex. 4 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Litton);

Issue No. 4 - Denied

Defendant contends that Plaintiff's Fourth Cause of Action for Adverse Employment Action in Violation of Public Policy is time-barred and fails because Plaintiff can not establish discrimination or retaliation.

Defendant repeats argument that the one year statute of limitations applies, but the two year statute of limitations of CCP 335.1 applies. Defendant also claims that Plaintiff Litton has failed

to establish discrimination/retaliation, but there are triable issues as to whether discrimination occurred (see Issue No. 1). The Court denies Defendant's Motion as to the Fourth Cause of Action.

Issue No. 5 - Granted

Defendant contends that Plaintiff's Fifth Cause of Action for Violation of Labor Code 970 fails because it was not filed within one year and because Plaintiff Litton fails to establish he detrimentally relied on misrepresentations.

This is a statutory claim against an employer for knowingly making false representations. The representations were made when Plaintiff Litton was offered employment in May/June 1996. Defendant cites Munoz v. Kaiser Steel Corp, (1984) 156 Cal.App.3d 965,980, for contention that a worker's claim for knowingly false representations accrued on the date they were discharged. For Plaintiff Litton, that date is January 2, 2002, and his complaint was filed August 12,2003. Although Plaintiff notes that the Aguilera court also applied the one year statute of limitations, it expressed doubt whether this was correct, Plaintiff seeks to apply the three year

statute of limitations for statutory violations in CCP 338. The Court applies the one year statute of limitations used by authorities for both parties, and grants Defendant's motion on the ground that Plaintiff's cause of action is time-barred.

Issue No. 6 - Granted

Defendant contends that Plaintiffs Sixth Cause of Action for Breach of Contract fails because Plaintiff was an at-will employee,

As on Motion No. 1, Issue 5, Defendant contends based on handbook and other documents, that Plaintiff was an at-will employee. See Defendant's Separate Statement at fact Nos. 80, 82, 84, 85. Plaintiff Litton relies on the same insufficient evidence as Plaintiff Haluck in trying to create triable issues of fact. The Court grants summary adjudication on this issue.

Issue No. 7 - Granted

Defendant contends that Plaintiff's Seventh Cause of Action for Breach of Good Faith and Fair Dealing fails because there is no employment contract.

The Court grants summary adjudication on this issue. This cause of action fails due to summary adjudication of issues being granted on Issue No. 6; there is no enforceable contract on which to base cause of action.

Issue No. 8 - Denied

Defendant contends that the Eighth Cause of Action for Intentional Infliction of Emotional Distress fails because Plaintiff Litton neglected to file his complaint within one year statute of limitations and because employment actions do not rise to the level of outrageous conduct.

The Court denies Defendant's motion for same reasons as Issue No. 7 in Motion No. 1, i.e., the two year statute of limitations of CCP 335.1 applies and there are triable issues of fact whether discrimination or retaliation occurred and thus there is question whether this is normal part of work environment and barred by workers' compensation exclusivity.

Issue No. 9 - Granted

Defendant contends that the Ninth Cause of Act son for Negligent Infliction of Emotional Distress is time-barred and fails because intentional torts cannot sustain a cause of action of negligence.

The Court denies Defendant's Motion as to Defendant's theory that the claim is time-barred based on one year statute of limitations; see prior analysis.

However, the Court grants Defendant's motion as to negligent infliction of Emotional distress based on Semore, 217 CA 3d 1087, 1105 and Cole 43 Cal.3d at 160. The acts of supervisors are inherently intentional and cannot support a cause of action for negligent infliction of emotional distress.

Motion No. 3 - Defendant Vaughn vs. Plaintiff Haluck - Denied, except as to the Ninth Cause of Action, which is Granted

Motion No. 5 - Defendant Nomura vs. Plaintiff Haluck - Denied except as to the Ninth Cause of Action, which is Granted

Motion No. 7 - Defendant Uesaka vs. Plaintiff Haluck - Denied except as to the Ninth Cause of Action, which is Granted

Motion No.9 - Defendant Ide vs. Plaintiff Haluck - Denied except as to the Ninth Cause of Action, which is Granted

These motions are addressed together, as Defendants have submitted a combined separate statement in support of these four motions. It is attached to motion No. 3.

Motions No. 3 , 5 , 7 , 9 are for summary judgment or summary adjudication of issues as to each of the causes of action asserted against the individual Defendants.

- Second Cause of Action - Retaliation

- Eighth Cause of Action - Intentional Infliction of Emotional Distress

- Ninth Cause of Action - Negligent Infliction of Emotional Distress

As to all Defendants, summary adjudication of issues as to the Ninth Cause of Action for negligent infliction of emotional distress should bc granted for same reasons as it was granted as to Defendant REI.

As to the Second and Eighth Causes of Action, the Court denies summary adjudication of issues as to all Defendants, despite the feeling that Plaintiff has no significant evidence against any of these individual Defendants that they retaliated against or committed outrageous acts against Plaintiff Haluck. Defendants as the moving party have the burden of proof. As to the acts complained of in 1995, there is no evidence that Defendants Vaughn, Nomura and Ide did not participate in this decision, which may not be time-barred if the continuing violation doctrine is found to apply.

As to Defendant Uesaka, although there is evidence he did not arrive until 2001, there is evidence he participated in the promotion of Nguyen to Director of Engineering in 2002. This could be evidence of retaliation and intentional discrimination, and could constitute outrageous conduct. See Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 4,6,9, 10.

[Haluck's Evidence, Fact No. 41: Haluck Declaration, paragraph 11; [Haluck's Evidence, Fact No. 6]: Haluck Declaration, paragraphs 12, 13, 14; [Haluck's Evidence, Fact No. 9 and 10]:Interrogatory, Set 2, Nos. 11, 12 and 14 (Ex. 16 to Declaration of Rachel Goldstein Re Lodgment of Evidence- Haluck); Haluck Deposition, vol. 1,89:2-93:1 (Ex. 5 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck).

Motion No. 4 - Defendant Vaughn vs. Plaintiff Litton - Granted

Motion No. 6 - Defendant Nomura vs. Plaintiff Litton - Denied, except as to the Ninth Cause of Action, which is Granted

Motion No. 8 - Defendant Jurdi vs. Plaintiff Litton - Granted

These motions are addressed together, as Defendants have submitted a combined separate statement in support of these three motions. It is attached to motion No. 4.

As on motions Nos. 3 , 5 , 7 , 9 , these motions are for

summary judgment or summary adjudication of issues as to each of the three causes of action asserted against the individual Defendants.

- Second Cause of Action - Retaliation
- Eighth Cause of Action - Intentional Infliction of Emotional Distress
- Ninth Cause of Action - Negligent Infliction of Emotional Distress

As to Defendant Vaughn, the Court grants summary judgment. See Defendant's Separate Statement at Fact Nos. 36-41. Plaintiff has no evidence that Vaughn committed any acts of retaliation or committed any outrageous conduct against Plaintiff Litton. Plaintiff Litton's sole evidence is that Plaintiff "felt" Vaughn was part of the mistreatment because he failed to stop it. This is insufficient.

As to Defendant Jurdi, the Court grants summary judgment. See Defendant's Separate Statement at Fact Nos. 36-41. Plaintiff has no evidence that Jurdi committed any acts of retaliation or outrageous conduct against Plaintiff Litton. Plaintiff's sole evidence

is that Jurdi told him he was being laid off, and participated in coming up with the criteria or layoff. This is insufficient to constitute retaliation or outrageous conduct.

As to Defendant Nomura, summary adjudication of issues will be granted on the Ninth Cause of Action for negligent infliction of emotional distress for the same reasons it was granted as to Defendant REI.

As to Second and Eighth Causes of action, the Court denied summary adjudication. There is evidence that Nomura knew of Plaintiff Litton's interest in promotion to certain positions before those positions were filled by other Asian employees. See Plaintiff's separate Statement in opposition to Motion for Summary Judgment at Fact Nos. 16-19. Litton's Evidence, Fact No. 16]: Litton Deposition, vol. II, 197:15-20 (Ex. 4 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Litton); [Litton's Evidence, fact No. 17 and 19]: Litton Declaration, par. 8; Ex. 7. Unlike Defendants Vaughn and Jurdi, Defendant Nomura fails to meet burden of proof that he did not retaliate against Plaintiff Litton. On the Eighth Cause of Action, Nomura fails to meet his burden of proof, only addresses

the questions of Plaintiff Litton's layoff, but fails to present evidence as to the earlier conduct alleged, which may not be found to be time-barred.

With respect to the evidentiary objections made by the parties, the Court rules as follows: all evidentiary objections are overruled.

IT IS THEREFORE ORDERED that the said Motions for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues, be denied or granted as detailed above.

DATED: 11/8/2004

/s/

Honorable James M. Brooks

Orange County Superior Court Judge

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 years, and am not a party to the within action; my business address is 23161 Mill Creek Drive, Suite 170, Laguna Hills, California 92653.

On the date herein below specified, I served the foregoing document, described as set forth below on the interested parties in this action, as follows:

DATE SERVED: OCTOBER 25, 2004

DOCUMENT SERVED: [PROPOSED] ORDER PARTIALLY DENYING AND PARTIALLY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES.

COUNSEL SERVED:

Kenneth J. Rose, Esq.

Melinda L. Mattingly, Esq.

701 "B" Street. 13" Floor

San Diego, CA 92101

Phone: 619 232-0441

XX (BY MAIL) I caused a true copy of the document(s), placed in a sealed postage fuly paid, to be place in the United States mail at Laguna Hills, California. I am "readily familiar" with the firm's business practice for collection and processing of mail, that in the ordinary curse of business said document(s) would be deposited with the U.S. Postal Service on that same day. In understand that the service shall be presumed invalid if the postal cancellation date is more than one day after the date of deposit for mailing contained in this affidavit.

XX (BY FACSIMILE) By use of facsimile machine telephone number (949) 587-1004, I served a copy of the documents(s) on the

interested parties via their respective fax numbers as listed on the attached service list.

____ (BY OVERNIGHT COURIER) I placed a true copy of the document specified in a sealed "Overnite Express" envelope, addressed as specified, with overnight courier fees fully paid, in a receptacle maintained by Overnite Express overnight courier service, at Laguna Hills, California, for guaranteed next business day delivery.

XX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Laguna Hills, California on October 25, 2004.

/s/

Sarah Korakas

Cal Code Civ Proc § 437c

DEERING'S CALIFORNIA CODES ANNOTATED

Copyright (c) 2004 by Matthew Bender & Company, Inc.

a member of the LexisNexis Group.

All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 SUPPLEMENT ***

INCLUDING URGENCY LEGISLATION THROUGH 2004 REG. SESS. CH. 954, 9/30/04

CODE OF CIVIL PROCEDURE

PART 2. Civil Actions

TITLE 6. Pleadings in Civil Actions

CHAPTER 5. Summary Judgments and Motions for Judgment on the Pleadings

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Code Civ Proc § 437c (2004)

STATUS: CONSULT SLIP CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT LEXSEE 2004 Cal. ALS 182 – See section 9, Effective 1/1/2005; Operative 7/1/2005

§ 437c. Summary judgment

(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. However, if the notice is served by mail, the required 75-day period of notice shall be increased by five days if the

place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, and if the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) (1) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a

sufficient ground for denial of the motion.

(2) Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.

(3) The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

(4) Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

(5) Evidentiary objections not made at the hearing shall be deemed waived.

(6) Except for subdivision (c) of Section 1005 relating to the method of service of opposition and reply papers, Sections 1005 and 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(7) Any incorporation by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.

(c) The motion for summary judgment shall be granted if all the

papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgmentmay not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived.

(e) If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not

owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. However, a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the

motion which indicates that a triable controversy exists. Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

(i) If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication. This section does not affect or limit the ability of any party to compel discovery under the Civil Discovery Act (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4).

(j) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur. Sanctions may not be imposed pursuant to this subdivision, except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard.

(k) Except when a separate judgment may properly be awarded in the action, no final judgment may be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

(*l*) In actions which arise out of an injury to the person or to property, if a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(m)(1) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section, except the entry of summary judgment, a party may, within 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate reviewing court

for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the initial period within which to file the petition shall be increased by two court days. The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(2) Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the

evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party.

(n)(1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion which has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary

adjudication was either not sought or denied.

(3) In the trial of an action, neither a party, nor a witness, nor the court shall comment upon the grant or denial of a motion for summary adjudication to a jury.

(o) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes an affirmative defense to that cause of action.

(p) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has

proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.

The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(q) This section does not extend the period for trial provided by Section 1170.5.

(r) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

(s) For the purposes of this section, a change in law does not include a later enacted statute without retroactive application.

HISTORY:

Added Stats 1973 ch 366 § 2. Amended Stats 1976 ch 675 § 1; Stats 1978 ch 949 § 2; Stats 1980 ch 57 § 1; Stats 1982 ch 1510 § 1; Stats 1983 ch 490 § 1; Stats 1984 ch 171 § 1; Stats 1986 ch 540 § 3; Stats 1989 ch 1416 § 16; Stats 1990 ch 1561 § 2 (SB 2594); Stats 1992 ch 339 § 1 (SB 1409), ch 1348 § 1 (AB 2616); Stats 1993 ch 276 § 1 (AB 498); Stats 1994 ch 493 § 1 (AB 651), effective September 11, 1994. Amended Stats 2002 ch 448 § 5 (SB 688); Stats 2003 ch 62 § 24 (SB 600).

NOTES:

Former Sections:

Former § 437c, similar to the present section, was added Stats 1933 ch 744 § 27, amended Stats 1937 ch 533 § 1, Stats 1939 ch 331 § 1, Stats 1951 ch 1737 § 53, operative January 1, 1952, Stats 1953 ch 908 § 1, Stats 1957 ch 1457 § 1, Stats 1965 ch 162 § 1, ch 1877 § 1, Stats 1971 ch 244 § 39, operative July 1, 1972, and repealed Stats 1973 ch 366 § 1.

LEXSTAT CA GOV 12940

DEERING'S CALIFORNIA CODES ANNOTATED

Copyright (c) 2004 by Matthew Bender & Company, Inc.

a member of the LexisNexis Group.

All rights reserved.

*** THIS DOCUMENT I S CURRENT THROUGH THE 2004 SUPPLEMENT ***

INCLUDING URGENCY LEGISLATION THROUGH 2004 REG. SESS. CH. 954, 9/30/04

GOVERNMENT CODE

TITLE 2. Government of the State of California

DIVISION 3. Executive Department

PART 2.8. Department of Fair Employment and Housing

CHAPTER 6. Discrimination Prohibited

ARTICLE 1. Unlawful Practices, Generally

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 12940 (2004)

§ 12940. Unlawful employment practices

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the

person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(5) Nothing in this part prohibits an employer from refusing to employ an individual because of his or her age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

LEXSTAT CA LAB 970

DEERING'S CALIFORNIA CODES ANNOTATED

Copyright (c) 2004 by Matthew Bender & Company, Inc.

a member of the LexisNexis Group.

All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 SUPPLEMENT ***

INCLUDING URGENCY LEGISLATION THROUGH 2004 REG. SESS. CH. 954, 9/30/04

LABOR CODE

DIVISION 2. Employment Regulation and Supervision

PART 3. Privileges and Immunities

CHAPTER 2. Solicitation of Employees by Misrepresentation

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Lab Code § 970 (2004)

§ 970. Influencing, persuading or engaging worker to change from one place to another by false representations

No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:

(a) The kind, character, or existence of such work;

(b) The length of time such work will last, or the compensation therefor;

(c) The sanitary or housing conditions relating to or surrounding the work;

(d) The existence or nonexistence of any strike, lockout, or other

labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

HISTORY:

Enacted 1937.

NOTES:

HISTORICAL DERIVATION:

Stats 1903 ch 229 § 1 p 269, as amended by Stats 1915 ch 45 § 1 p 52, Stats 1923 ch 262 § 1 p 514, Stats 1927 ch 268 § 1 p 488.

CROSS REFERENCES:

Violation as misdemeanor: Lab C § 971.

Liability in civil action: Lab C § 972.

COLLATERAL REFERENCES:

Judicial Council of California Civil Jury Instructions, CACI Nos. 2710, VF-2704 (Matthew Bender).

Witkin Summary (9th ed) Contracts § 282.

FORMS:

For a form of complaint to recover damages for solicitation of employee by misrepresentation, see Lab C § 972.

LAW REVIEW ARTICLES:

Violation of Labor Code supports a public policy wrongful discharge claim (Lazar v Superior Court (1994) 30 CA4th 496, 35 CR2d 578). 16 CEB Bus L Rep 276.

ATTORNEY GENERAL'S OPINIONS:

This statute as indicating that state law has preempted field of employment and referrals for employment of replacements in labor disputes. 45 Ops. Cal. Atty. Gen. 140.

ANNOTATIONS:

Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud. 16 ALR3d 1311.

Employer's misrepresentation as to prospect, or duration of, employment as actionable fraud. 24 ALR3d 1412.

NOTES OF DECISIONS

The words "to change from one place to another," in Lab Code, § 970, prohibiting a person from persuading another person to make such a "change" through false representations as to contemplated employment or employment conditions, import temporary, as well as permanent, relocation of residence, as contrasted with a mere change in the site of employment. Collins v Rocha (1972) 7 C3d 232, 102 Cal Rptr 1, 497 P2d 225.

In an action purportedly brought on behalf of a class, to recover damages, based on, among other theories, false representations allegedly made by defendant, a labor contractor, as to the availability of employment for plaintiffs as farmworkers, it was error to sustain a demurrer to the complaint on the ground that it failed to state a proper class action, as result of its failure to demonstrate an ascertainable class with the same community of interest, where the identity of each member of the class could be ascertained from the

records of defendant and the Farm Labor Office, an inference of reliance on defendant's representations was proper under the allegations, a community of interest was demonstrated by allegations indicating that he did not intend to comply with his representations and deliberately recruited more workers than were justified, in contemplation of discharging the excess, and there was a substantial likelihood that the only issue requiring separate proof would be the matter of damages. Collins v Rocha (1972) 7 C3d 232, 102 Cal Rptr 1, 497 P2d 225.

Plaintiffs in a class action seeking double damages under Lab Code, §§ 970, 972, on the ground that they were persuaded to come to California from Texas by defendants' knowingly false representations as to the existence and character of work in this state, could not successfully contend, in support of a claim of abuse of discretion, that the trial court's order staying the action on the ground of inconvenient forum pending the filing of suit in Texas would deprive them of their double damage remedy. In determining the substantive rights of the parties in tort actions, Texas courts apply the law of the place where the cause of action arose, which is the place of the injury

rather than the place of the wrongful act or omission, and, though the alleged representations were made in Texas, plaintiffs' injury occurred only after they came to California and found that the promised work was unavailable. Texas also considers the measure of damages to be a substantive matter controlled by the law of the state where the injury occurred, and there is nothing to indicate that a Texas court would regard the double damages as an unenforceable penalty or as contrary to the public policy of that state. Chavarria v Superior Court of Fresno County (1974) 40 CA3d 1073, 115 Cal Rptr 549.

The public policy codified by Lab. Code, § 970, whereby employers may not cause employees to move to, from, or within California by misrepresentation of the nature, length, or physical conditions of employment, provides an exception to the employment-at-will doctrine. This statute was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce migrant workers to move in the first instance. Tyco Industries, Inc. v Superior Court (1985, 2d Dist) 164 Cal App 3d

148, 211 Cal Rptr 540.

A terminated regional sales manager who prevailed in his action against his former employer for breach of the implied covenant of good faith and fair dealing was entitled to double damages pursuant to Lab. Code, §§ 970 and 972, preventing employers from inducing employees to move to, from, or within California by misrepresenting the nature, length, or physical conditions of employment. Plaintiff was induced to move to California based on false representations concerning the nature of the regional sales manager position. Cognizant of the fact that the employer had experienced marketing difficulties in the past, plaintiff inquired and received false assurances regarding that issue before accepting the position, and accepted the position based on the misrepresentations. As a result of the false representations, plaintiff lost commissions and was terminated from his position because he was unable to reach his sales quota. Lab. Code, § 970, was thereby implicated and pursuant to Lab. Code, § 972, plaintiff was entitled to double damages. Seubert v McKesson Corp. (1990, 1st Dist) 223 Cal App 3d 1514, 273 Cal Rptr 296.

Lab. Code, § 970, preventing employers from inducing employees to move to, from, or within California by misrepresenting the nature, length, or physical conditions of employment, was enacted to protect migrant workers from the abuses inflicted by unscrupulous employers and potential employers, especially involving false promises made to induce migrant workers to move in the first instance. However, § 970, and Lab. Code, § 972, imposing double damages for violations, apply to other employment situations as well. Nothing in the statute restricts application of the statutory language to any particular class or kind of employment. The apparent purpose of the statutes is to protect potential employees from being solicited to change employment by false representation concerning the nature or duration of employment. The statutory scheme is particularly addressed to preventing employers from inducing potential employees to move to a new locale based on misrepresentations of the nature of the employment. Seubert v McKesson Corp. (1990, 1st Dist) 223 Cal App 3d 1514, 273 Cal Rptr 296.

In a successful action by a former general manager of a raceway against the raceway and its principal shareholder for wrongful

termination based on a violation of Lab. Code, § 970 (solicitation of employee through misrepresentations concerning length of employment), breach of contract, and negligent misrepresentation, the jury did not err in awarding plaintiff noneconomic damages. Generally, wrongful termination constitutes a breach of contract rather than a tort, and the terminated employee is limited to contract damages. An exception exists, however, when the termination occurs in violation of a public policy that involves a duty affecting the public at large, rather than one owed to or imposed solely upon the parties to the dispute, and that has a constitutional or statutory basis. In the present case, Lab. Code, § 970, stated the applicable public policy. The violation of that provision is punishable as a criminal offense (Lab. Code, § 971), and renders the defendant liable to the employee for double damages (Lab. Code, § 972). Finch v Brenda Raceway Corp. (1994, 1st Dist) 22 Cal App 4th 547, 27 Cal Rptr 2d 531.

Where (1) plaintiff was hired by defendant newspaper as an investigative reporter, to write expose-style articles for a local newspaper, which published two articles written by plaintiff

containing allegations of corruption, favoritism, and influence-peddling involving an individual hired by local developers to obtain approval from the city government for a controversial luxury housing development, (2) after the individual made a demand for a correction in accordance with CC § 48a, the newspaper published a prominent retraction, apologizing for its previous publication of inaccurate and misleading information concerning the individual and stating that there was no evidence that he was involved in improper, corrupt, or illegal activities relating to the development, and (3) shortly thereafter, the defendant terminated plaintiff's employment, the trial court did not err when it granted defendants' motion for summary judgment on all plaintiff's causes of action, against the newspaper, its managing editor, and editor alleging, inter alia, wrongful termination and breach of employment contract. Contrary to plaintiff's assertion that his termination was a violation of Lab C § 970, that statute prohibits employers from inducing employees to change from one place to another for the purpose of working in any branch of labor, through or by means of knowingly false representations concerning the nature, duration, or conditions of employment. The statute was

inapplicable here. First, it requires the employee to demonstrate that his or her employer made knowingly false representations concerning the nature, duration, or conditions or employment, but there was no evidence of such misrepresentations in this case. Moreover, under the statute an employee must establish that the employer induced him or her to relocate or change residences and, again, there was no such evidence in this case. Eisenberg v Alameda Newspapers, Inc. (1999, 1st Dist) 74 Cal App 4th 1359, 1391, 88 Cal Rptr 2d 802.

An action by an attorney who was hired by a county counsel and terminated within a few weeks, alleging that he was wrongfully induced to relocate his residence by a promise of a permanent position, was barred by virtue of the county's immunity under Gov C § 818.8. Plaintiff did not allege that a public entity gave gratuitous advice derived in a negligent manner, but claimed that the county engaged in willful misrepresentation concerning the terms of his employment. In addition, plaintiff's employment by the county involved a sufficient financial interest to trigger the immunity of § 818.8. Nor does Lab C § 970 supersede the immunities of the Tort Claims Act; § 970 creates a statutory tort cause of action which, by

its nature, is subject to the Tort Claims Act. Further, the county was not vicariously liable under Gov C § 815.2; even in cases in which a public employee is liable for actual fraud, the public entity is immune. Burden v County of Santa Clara (2000, 6th Dist) 81 Cal App 4th 244, 248, 96 Cal Rptr 2d 587.

Employee's claim for wrongful termination in violation of public policy under Cal. Lab. Code § 970, in that he was fraudulently induced by his employer to move to take employment, asserted a claim involving an unwaivable statutory right subject to a mandatory employment arbitration agreement; as such, it was subject to Armendariz analysis but because the terms of the arbitration agreement in the employee's signed job application complied with the Armendariz factors, the agreement, although constituting a contract of adhesion, was enforceable. Fittante v Palm Springs Motors, Inc. (2003, 4th Dist) 105 Cal App 4th 708, 129 Cal Rptr 2d 659.

Employee's claim for wrongful termination in violation of public policy under Cal. Lab. Code § 970, in that he was fraudulently induced by his employer to move to take employment, asserted a

UNITED STATES CODE SERVICE

Copyright © 2004 Matthew Bender & Company, Inc.,

one of the LEXIS Publishing (TM) companies

All rights reserved

*** CURRENT THROUGH P.L. 108-410, APPROVED 10/30/04

***

*** WITH A GAP OF 108-375 ***

TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY

GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

8 USCS § 1101 (2004)

§ 1101. Definitions [Caution: See prospective amendment notes below.]

(a)

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 104(b) of this Act [8 USCS § 1104(b)].

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or

other officer or employee of the United States designated under regulations prescribed under authority contained in this Act, for the purpose of issuing immigrant or nonimmigrant visas or, when used in title III [8 USCS §§ 1401 et seq.], for the purpose of adjudicating nationality.

(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.

(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13) (A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 212(d)(5) [8 USCS § 1182(d)(5)] or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United

States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,

(v) has committed an offense identified in section 212(a)(2) [8 USCS § 1182(a)(2)], unless since such offense the alien has been granted relief under section 212(h) or 240A(a) [8 USCS §§ 1182(h) or 1229b(a)], or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under

mandate or trusteeship shall be regarded as separate foreign states.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

(A)

(i) an ambassador, public minister, or career diplomatic or an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign

press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758) [22 USCS § 287 note];

(D) (i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 258(a) [8 USCS § 1288(a)] (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity

required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam and solely in pursuit of his calling as a crewman and to depart from Guam with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States

temporarily and solely for the purpose of pursuing such a course of study consistent with section 214(l) [8 USCS § 1184(l)] at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)

(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization, and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such

representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) **[Caution: For expiration of amendments made to this subparagraph by Act Nov. 12, 1999, P.L. 106-95, see § 2(e) of such Act, which appears as 8 USCS § 1182 note.]** an alien (i)(a) [Deleted] (b) subject to section 212(j)(2) [8 USCS § 1182(j)(2)] who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 214(i)(1) [8 USCS § 1184(i)(1)] or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) [8 USCS § 1184(i)(2)] or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) [8 USCS § 1182(n)(1)], or (b1) who is entitled to enter the United States under and in pursuance of

the provisions of an agreement listed in section 214(g)(8)(A) [8 USCS § 1184(g)(8)(A)], who is engaged in a specialty occupation described in section 214(i)(3) [8 USCS § 1184(i)(3)], and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1) [8 USCS § 1182(t)(1)], or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 212(m)(1) [8 USCS § 1182(m)(1)], and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) [8 USCS § 1182(m)(2)] for the facility (as defined in section 212(m)(6)) [8 USCS § 1182(m)(6)]) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal

Revenue Code of 1954 [26 USCS § 3121(g)] and agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a

representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j) [8 USCS § 1182(j)], and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) of section 214 [8 USCS § 1184], an alien who--

(i) is the fiancee or fiance of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage

with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) [8 USCS § 1151(b)(2)(A)(i)] that was filed under section 204 [8 USCS § 1154] by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 214(c)(2) [8 USCS § 1184(c)(2)], an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M) (i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N) (i) the parent of an alien accorded the status of special immigrant

under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who--

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability;

(ii) (I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are

not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who--

(i) (a) is described in section 214(c)(4)(A) [8 USCS § 1184(c)(4)(A)] (relating to athletes), or (b) is described in section 214(c)(4)(B) [8 USCS § 1184(c)(4)(B)] (relating to entertainment groups);

(ii) (I) performs as an artist or entertainer, individually or as part of a

group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii) (I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q) (i) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an

international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; or (ii)(I) an alien citizen of the United Kingdom or the Republic of Ireland, 21 to 35 years of age, unemployed for not less than 12 months, and having a residence for not less than 18 months in Northern Ireland, or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal within the Republic of Ireland, which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 24 months) to the United States as a participant in a cultural and training program approved by the Secretary of State and the Secretary of Homeland Security under section 2(a) of the Irish Peace Process Cultural and Training Program Act of 1998 [note to this section] for the purpose of providing practical training, employment, and the experience of coexistence and conflict resolution in a diverse society, and (II) the alien spouse and minor children of any such alien if accompanying the alien or

following to join the alien;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who--

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 214(k) [8 USCS § 1184(k)], an alien--

(i) who the Attorney General determines--

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine--

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956 [22 USCS § 2708(a)], and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T) (i) subject to section 214(o) [8 USCS § 1184(o)], an alien who the Attorney General determines--

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act

of 2000 [22 USCS § 7102],

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III) (aa) has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or

(bb) has not attained 18 years of age, and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if the Attorney General considers it necessary to avoid extreme hardship--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; and

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien,

if accompanying, or following to join, the alien described in clause (i);

(U) (i) subject to section 214(p) [8 USCS § 1184(p)], an alien who files a petition for status under this subparagraph, if the Attorney General determines that--

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and

possessions of the United States;

(ii) if the Attorney General considers it necessary to avoid extreme hardship to the spouse, the child, or, in the case of an alien child, the parent of the alien described in clause (i), the Attorney General may also grant status under this paragraph based upon certification of a government official listed in clause (i)(III) that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien child, the parent of the alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 214(q) [8 USCS § 1184(q)], an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 203(d) [8 USCS § 1153(d)]) of a petition to accord a status under section 203(a)(2)(A) [8 USCS § 1153(a)(2)(A)] that was filed with the Attorney General under section 204 [8 USCS § 1154] on or before the date of the enactment of the Legal Immigration Family Equity Act [enacted Dec. 21, 2000], if--

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and--

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 203(a)(2)(A) [8 USCS § 1153(a)(2)(A)]; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 245 [8 USCS § 1255], pursuant to the approval of such petition, remains pending.

LEXSEE 11 U.S.T. 2398

U.S. Treaties on LEXIS

FRANCE

Establishment

TIAS 4625

11 U.S.T. 2398; 1959 U.S.T. LEXIS 384

November 25, 1959, Date-Signed

December 21, 1960, Date-In-Force

STATUS:

[*1] Convention, with protocol and joint declaration, signed at Paris November 25, 1959;

Ratification advised by the Senate of the United States of America August 17, 1960,

Ratified by the President of the United States of America August 29, 1960;

Ratified by the President of the French Republic, President of the Community, October 28, 1960;

Ratifications exchanged at Washington November 21, 1960;

Proclaimed by the President of the United States of America December 8, 1960;

Entered into force December 21, 1960.

[NO LONG-TITLE IN ORIGINAL]

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a convention of establishment between the United States of America and France, together with a protocol relating thereto, was signed at Paris on November 25, 1959, and a joint declaration relating thereto was initialed at Paris on the same date, the originals of which convention, protocol, and joint declaration, being in the English and French languages, are word for word as follows:

CONVENTION OF ESTABLISHMENT BETWEEN THE UNITED STATES OF AMERICA AND FRANCE

The President of the United States of America and the President of the French Republic, President of the Community, desirous [*2] of strengthening the ties of peace and friendship traditionally existing between the two countries and of encouraging closer economic intercourse between their peoples, conscious of the contribution which may be made to these ends by arrangements that provide in each country reciprocal rights and privileges on behalf of nationals and companies of the other country, thus encouraging mutually advantageous investments and mutually beneficial commercial relations, have resolved to conclude a convention of establishment and, for that purpose have appointed as Plenipotentiaries:

The President of the United States of America,

The Honorable AMORY HOUGHTON, Ambassador of the United States of America at Paris,

and the President of the French Republic, President of the Community,

M. MAURICE COUVE DE MURVILLE, Minister of Foreign Affairs,

who, having communicated to each other their full powers, found to be in due form, have agreed on the following Articles:

ARTICLE I

Each High Contracting Party shall accord equitable treatment to nationals and companies of the other High Contracting Party, both as to their persons and as to their property, enterprises and other interests, and shall assure [*3] them within its territories full legal and judicial protection.

ARTICLE II

1. Nationals of either High Contracting Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other High Contracting Party, to travel therein freely, and to reside therein at places of their choice. They shall in

particular be permitted to enter the territories of the other High Contracting Party and to remain therein, for the purpose of:

(a) carrying on trade between the territories of the two High Contracting Parties and engaging in related commercial activities;
(b) developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.

2. Nationals of each High Contracting Party shall enjoy, within the territories of the other High Contracting Party, freedom of conscience, of worship, of information and of the press.

3. The provisions of the present Article shall be subject to the right of either High Contracting Party to take measures that are necessary for the maintenance of public order and for the protection of public health, [*4] morals, and safety.

ARTICLE III

1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to access to the courts of justice as well as to administrative tribunals and agencies, within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. Companies of either High Contracting Party not engaged in activities within the territories of the other High Contracting Party shall enjoy such access therein without any requirement of registration. Nationals of either High Contracting Party shall be accorded the benefits of legal aid within the territories of the other High Contracting Party under the same conditions as its own nationals.

2. Contracts entered into between nationals and companies of either High Contracting Party and nationals and companies of the other High Contracting Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other High Contracting Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that [*5] the nationality of one or more of

the arbitrators is not that of such other High Contracting Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either High Contracting Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such High Contracting Party.

ARTICLE IV

1. The lawfully acquired rights and interests of nationals and companies of either High Contracting Party shall not be subjected to impairment, within the territories of the other High Contracting Party, by any measure of a discriminatory character.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall be free from molestation and other unjustifiable measures. Official searches

conducted on such premises, when necessary, shall be carried out in conformity with the law and with every consideration [*6] for the convenience of the occupants and the conduct of business.

3. Property of nationals and companies of either High Contracting Party shall not be expropriated within the territories of the other High Contracting Party except for a public purpose and with payment of a just compensation. Such compensation shall represent the equivalent of the property taken; it shall be accorded in an effectively realizable form and without needless delay. Adequate provision for the determination and payment of the said compensation must have been made no later than the time of the taking.

4. Nationals and companies of either High Contracting Party shall in no case be accorded, within the territories of the other High Contracting Party, less than national treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article.

ARTICLE V

1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other High Contracting Party, whether directly or through the intermediary of an agent or of any other natural [*7] or juridical person. Accordingly, such nationals and companies shall be permitted within such territories:

(a) to establish and to maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business;

(b) to organize companies under the general company laws of such other High Contracting Party, and to acquire majority interests in companies of such other High Contracting Party;

(c) to control and manage the enterprises which they have established or acquired.

Moreover, the enterprises which they control, whether in the form of

an individual proprietorship, of a company or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other High Contracting Party.

2. Each High Contracting Party reserves the right to determine the extent to which aliens may, within its territories, create, control, manage or acquire interests in, enterprises engaged in communications, air or water transport, banking involving depository or fiduciary functions, exploitation of the soil or other natural resources, [*8] and the production of electricity.

3. Each High Contracting Party undertakes not to intensify, within its territories, existing limitations as regards enterprises belonging to or controlled by nationals and companies of the other High Contracting Party which are already engaged in the activities cited in the preceding paragraph. Moreover, each High Contracting Party shall permit, within its territories, transportation, communications and

banking companies of the other High Contracting Party to maintain branches and agencies, in conformity with the laws in force, which are necessary to the operations of an essentially international character in which they are engaged.

ARTICLE VI

1. Nationals and companies of either High Contracting Party shall be permitted to engage, at their choice, within the territories of the other High Contracting Party, accountants and other technical experts, lawyers, and personnel who by reason of their special capacities are essential to the functioning of the enterprise. But these persons must fulfill the conditions necessary to the exercise of their calling under the applicable legislation.

2. In any event, such nationals and companies shall be permitted [*9] to engage accountants and other technical experts, who are not nationals of the other High Contracting Party, without regard to their having qualified to practice a profession within the territories of such other High Contracting Party, but exclusively for conducting studies

and examinations for internal purposes on behalf of such nationals and companies.

ARTICLE VII

1. Nationals and companies of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, national treatment with respect to leasing, utilizing and occupying real property of all kinds appropriate to the exercise of the rights accorded them by the other Articles of the present Convention. They shall also be accorded therein, as regards the acquisition and possession of real property, all other rights to which aliens and alien companies are entitled under the legislation of such other High Contracting Party, each High Contracting Party reserving the right to invoke reciprocity in this respect.

2. Nationals and companies of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, national treatment with respect to leasing [*10] and acquiring, by purchase or otherwise, as well as with respect to possessing, personal

property of every kind, whether tangible or intangible, with the exception of ships. However, either High Contracting Party may impose restrictions on alien ownership of materials dangerous from the viewpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activity, but only to the extent compatible with the enjoyment of the rights and privileges defined in Article V or provided by other provisions of the present Convention.

3. Nationals and companies of either High Contracting Party shall be accorded within the territories of the other High Contracting Party national treatment with respect to the right to dispose of property of all kinds.

ARTICLE VIII

1. Nationals and companies of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, national treatment with respect to obtaining and maintaining patents of invention and with respect to rights appertaining to trade-marks, trade names and certification marks, or which in any manner relate to

industrial property.

2. The High Contracting Parties [*11] undertake to cooperate with a view to furthering the interchange and use of scientific and technical knowledge, particularly in the interest of increasing productivity and improving standards of living within their respective territories.

ARTICLE IX

1. The following categories:

(a) nationals of either High Contracting Party residing within the territories of the other High Contracting Party,

(b) nationals of either High Contracting Party not residing within the territories of the other High Contracting Party but engaged in trade or other gainful pursuit within such territories, whether or not through a permanent establishment or a fixed place of business,

(c) companies of either High Contracting Party engaged in trade or

other gainful pursuit within the territories of the other High Contracting Party, whether or not through a permanent establishment or a fixed place of business,

(d) associations of either High Contracting Party that are engaged in scientific, educational, religious or philanthropic activities within the territories of the other High Contracting Party, whether through a fixed place of business or otherwise,

shall not be subject to any form of taxation or any [*12] obligation relating thereto, within the territories of such other High Contracting Party, which is more burdensome than that to which nationals, companies and associations of such other High Contracting Party in the same situation are or may be subject.

2. Nationals, companies and associations of either High Contracting Party, not falling within one of the categories specified in paragraph 1 above, shall not be subject, within the territories of the other High Contracting Party, to any form of taxation or any obligation relating

thereto which is more burdensome than that to which nationals, companies and associations of any third country in the same situation are or may be subject.

3. Enterprises of either High Contracting Party, the capital of which is owned or controlled in whole or in part, directly or indirectly, by one or more nationals of the other High Contracting Party, shall not be subject in the first High Contracting Party to any form of taxation or any obligation relating thereto which is more burdensome than that to which other like enterprises of the first High Contracting Party are or may be subject.

4. The nationals, companies and associations of either High Contracting [*13] Party referred to in paragraph 1 (b), (c), and (d) of the present Article shall not be subject, within the territories of the other High Contracting Party, to any form of taxation upon capital, income, profits or any other basis, except by reason of the property which they possess within those territories, the income and profits derived from sources therein, the business in which they are there

engaged, the transactions which they accomplish there, or any other bases of taxation directly related to their activities within those territories.

5. The term "form of taxation", as used in the present Article, includes all taxes of whatever nature or denomination.

6. Each High Contracting Party reserves the right to:

(a) extend to the nationals, companies and associations of third countries, specific tax advantages on the basis of reciprocity;

(b) accord special tax advantages by virtue of agreements with third countries for the avoidance of double taxation;

(c) apply special provisions in allowing, to non-residents, exemptions of a personal nature in connection with income and inheritance taxes;

(d) extend special advantages to its own nationals and residents in connection with joint returns [*14] by husband and wife.

7. The foregoing provisions shall not prevent the levying, in appropriate cases, of fees relating to the accomplishment of police and other formalities, if these fees are also levied on other foreigners. The rates for such fees shall not exceed those charged the nationals of any other country.

ARTICLE X

1. Nationals and companies of either High Contracting Party shall be accorded by the other High Contracting Party the same treatment as nationals and companies of such other High Contracting Party in like situations, with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two High Contracting Parties as well as between the territories of such other High Contracting Party and any third country. This treatment shall be not less favorable than that accorded to nationals and companies of any third country in like situations.

2. Neither High Contracting Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. The [*15] provisions of the present Article do not alter the obligations either High Contracting Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a High Contracting Party to impose such restrictions.

3. The two High Contracting Parties, recognizing that the freedom of movement of investment capital and of the returns thereon would be conducive to the realization of the objectives of the present Convention, are agreed that such movements shall not be unnecessarily hampered. In this spirit, each High Contracting Party will make every effort to accord, in the greatest possible measure, to nationals and companies of the other High Contracting Party the opportunity to make investments and to repatriate the proceeds of the

liquidation thereof. This principle shall apply also to the compensation referred to in Article IV, paragraph 3, of the present Convention. Each High Contracting Party shall make reasonable provision for the withdrawal of earnings from investments, whether in the form of salaries, dividends, interest, commissions, royalties, payments for technical services, or payments for other [*16] current transactions relative to investments. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, a rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either High Contracting Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other High Contracting Party, nor to the competitive position thereof.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, charges and taxes, regulations, or other requirements imposed by either High Contracting Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two High Contracting Parties.

ARTICLE XI

Each High Contracting Party will take the measures it deems appropriate with a view to preventing commercial practices or arrangements, [*17] whether effected by one or more private or public commercial enterprises, which restrain competition, limit access to markets or foster monopolistic control, whenever such practices or arrangements have or might have harmful effects on trade between the two countries.

ARTICLE XII

The provisions of the present Convention shall not preclude the application of measures:

(a) regulating the importation and exportation of gold and silver;

(b) regarding fissionable materials, the radio-active by-products of the utilization or manufacture of such materials, or raw materials which are the source of fissionable materials;

(c) regulating the manufacture of and traffic in arms, munitions and implements of war, as well as traffic in other materials carried on directly or indirectly for the purpose of supplying military establishments;

(d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

ARTICLE XIII

The High Contracting Parties may deny to any company, in the ownership or direction of which nationals of a third country or

countries have directly [*18] or indirectly a controlling interest, the advantages of the present Convention, except with respect to recognition of juridical status and access to the courts.

ARTICLE XIV

1. The term "national treatment" means treatment accorded to nationals and companies of either High Contracting Party within the territories of the other High Contracting Party upon terms no less favorable than the treatment therein accorded, in like situations, to the nationals and companies, as the case may be, of such other High Contracting Party.

2. National treatment accorded under the provisions of the present Convention to French companies shall, in any State, territory or possession of the United States of America, be the treatment accorded therein to companies constituted in other States, territories and possessions of the United States of America.

3. As used in the present Convention, the term "nationals"

("ressortissants") means natural persons having the nationality of a High Contracting Party and not domiciled in a non-metropolitan territory thereof to which the present Convention does not extend.

4. As used in the present Convention, the term "companies" ("societes") means:

(a) as concerns the [*19] United States of America, corporations, partnerships, limited liability companies, and other entities having legal personality, whether or not with limited liability, but for pecuniary profit;

(b) as concerns France, "societes civiles", "societes en nom collectif", "associations en participation", "societes en commandite simple", "societes en commandite par actions", "societes anonymes", "societes a responsabilite limitee" and, in general, entities having legal personality for pecuniary profit.

5. Companies constituted under the applicable laws and regulations

within the territories of either High Contracting Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other High Contracting Party.

6. Non-profit associations lawfully constituted within the territories of either High Contracting Party shall have their juridical status recognized by the other High Contracting Party and shall, *inter alia*, be accorded within the territories thereof the rights provided in Article III, paragraph 1, of the present Convention.

ARTICLE XV

1. The present Convention shall apply:

(a) As concerns the United States of America, to [*20] all territories under the sovereignty or authority thereof, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands;

(b) As concerns the French Republic, to the metropolitan departments, the Algerian departments, the departments of The Oasis

and Saoura, the departments of Martinique, Guadaloupe, Guiana and Reunion.

2. The present Convention may be made applicable, by virtue of exchanges of notes between the Governments of the High Contracting Parties, to the Overseas Territories of the French Republic or to one or several such Territories, under the conditions fixed, in each case, in the said exchanges of notes.

3. The present Convention may be made applicable, in the same manner, to the member States of the Community or to one or several such States.

ARTICLE XVI

1. Each High Contracting Party shall accord sympathetic consideration to such representations as the other High Contracting Party may make with respect to any question affecting the application of the present Convention, and shall afford opportunity for an exchange of views relative thereto.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present [*21] Convention, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

ARTICLE XVII

The entry into force of the present Convention shall terminate the Trade-mark Convention signed at Washington April 16, 1869. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 TS 94; 16 Stat. 771.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

ARTICLE XVIII

1. The present Convention shall be ratified. It will enter into force one month after the exchange of the instruments of ratification, which will take place at Washington.

2. The present Convention shall have an initial term of ten years. It shall remain in force thereafter until either High Contracting Party terminates it by giving to the other High Contracting Party a written notice one year in advance.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Convention and have hereunto affixed their seals.

DONE in duplicate, in the English and French languages, both equally authentic, at Paris, this twenty-fifth day [*22] of November, one thousand nine hundred fifty-nine.

PROTOCOL

The undersigned Plenipotentiaries, duly authorized by their respective Governments, are further agreed on the following provisions, which shall form an integral part of the Convention of Establishment between the United States of America and France dated the twenty-fifth of November, one thousand nine hundred fifty-nine.

1. (a) The protection provided in Article I engages the competent authorities of each High Contracting Party to inform immediately the consuls of the other High Contracting Party of the arrest or detention of any of its nationals, if the latter so requests. The consul may then be authorized to visit such national, in conformity with the regulations of the institution of detention, and to confer with him. The competent authority will assure the transmission to the consul of all correspondence directed to him by such national.

(b) Such national shall have the right to all guaranties provided in the laws of the High Contracting Party within the territories of which he is detained, and which assure accused persons of humane treatment, the right to be informed immediately of the accusations against them, [*23] to be defended by an attorney of their choice, and to be judged as rapidly as possible.

2. (a) Notwithstanding the provisions of the present Convention, the laws and regulations in force within the territories of either High Contracting Party which govern the access of aliens to the

professions and occupations, as well as the exercise of such callings and other activities by them, remain applicable as concerns nationals and companies of the other High Contracting Party.

(b) However, the procedures provided for by the above-mentioned laws and regulations, as well as those provided for by the laws and regulations governing the entry and sojourn of aliens, must not have the effect of impairing the substance of the rights set forth in Article II, paragraph 1 (a) and (b).

(c) The provisions of Article II, paragraph 1 (b), shall be construed as extending to nationals of either High Contracting Party proceeding to the territories of the other High Contracting Party for the purpose of occupying a position of responsibility in an enterprise on behalf of nationals and companies of the first High Contracting Party that have invested a substantial amount of capital in such enterprise or that [*24] are in the process of making such an investment.

(d) The advantages accorded a national of either High Contracting

Party under the provisions of Article II, paragraph 1 (a) and (b), with respect to entry and sojourn in the territories of the other High Contracting Party, shall extend to his spouse and minor unmarried children who accompany or next follow to join him.

3. The provision of Article III, paragraph 1, relating to access to the courts of justice, shall not affect the regulations in force within the territories of either High Contracting Party concerning the *cautio judicatum solvi*.

4. The provisions of the last sentence of Article III, paragraph 2, shall not affect the reservation concerning the place where the award is rendered, made by France in adhering to the Convention of New York of June 10, 1958 for the recognition and execution of foreign arbitral awards.

5. In Article IV, paragraph 3, the term "expropriated . . . for a public purpose" extends *inter alia* to nationalizations.

6. The provisions of Article IV, paragraph 3, providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals and companies of either High [*25] Contracting Party in property expropriated within the territories of the other High Contracting Party.

7. The provisions of Article V, paragraph 1, shall not impair the laws and regulations in force within the territories of either High Contracting Party which reserve the practice of certain professions to nationals.

8. The provisions of Article V, paragraph 1, do not preclude the right of either High Contracting Party to apply special requirements to alien insurance companies to the end that they furnish guaranties, in the interest of insured persons and of third parties, equivalent to those required of companies of the country.

9. The provisions of Article VI, paragraph 2, are adopted with regard to accountancy until such time as it may have become possible to

conclude an agreement concerning the exercise of this profession.

10. The right to invoke reciprocity as provided in Article VII, paragraph 1, shall permit the French Government, taking into account the treatment accorded French nationals and companies in a State, territory or possession of the United States of America, to apply analogous treatment to nationals and companies of the United States of America, respectively domiciled [*26] in such State, territory or possession or constituted under its laws.

11. In the event that a French national or company, having acquired real property by testate or intestate succession, should be precluded by reason of alienage from enjoying rights of ownership in such property in a State, territory or possession of the United States of America, such national or company will be allowed a period of at least five years in which to dispose of it.

12. The provisions of Article VII, paragraphs 2 and 3, shall not prevent the enforcement of regulations governing transactions on the

part of non-residents and aliens in foreign stocks and bonds.

13. The provisions of Article X, paragraph 1, shall not preclude differing treatment from being applied to different currencies, as may be required by the state of the balance of payments of either High Contracting Party.

14. Either High Contracting Party, with a view to protecting its currency or facilitating the servicing of the proceeds of investments and the repatriation of capital, may subject to authorization the making of investments by foreign nationals and companies.

15. The phrase, "in the greatest possible measure", employed in Article [*27] X, paragraph 3, shall be understood to refer to the conditions cited in Article X, paragraph 2.

16. Residence criteria may be applied for purposes of determining whether or not nationals and companies of either High Contracting Party are in "like situations" as that term is employed in paragraph 1

of Article XIV and in the other provisions of the present Convention.

17. Article XV does not apply to territories which are subject to the authority of either High Contracting Party solely as a military base or by reason of temporary military occupation.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present protocol and have hereunto affixed their seals.

DONE in duplicate, in the English and French languages, both equally authentic, at Paris, this twenty-fifth day of November, one thousand nine hundred fifty-nine.

JOINT DECLARATION

The two Governments deem it appropriate to clarify, at the moment of proceeding to the signing of the Convention of Establishment between the United States of America and France, the import of the reservations relating, on the one hand, to the enforcement of the laws governing the entry and sojourn of aliens and, on the other hand, to

[*28] the enforcement of the laws regulating the access of aliens to the professions and occupations.

It is expressly stipulated in the Protocol to the Convention that those reservations shall not impair the substance of the rights granted to the nationals of either High Contracting Party who have invested a substantial amount of capital or are in the process of making such an investment within the territories of the other High Contracting Party, or who proceed thereto for the purpose of engaging in trade between the two High Contracting Parties.

However, the two Governments also have the intention of facilitating, to the greatest possible extent and on a basis of real and effective reciprocity, the establishment of nationals who are not within the above-cited categories and, in particular, of qualified personnel who are indispensable to the conduct of the enterprises created by nationals and companies of either High Contracting Party within the territories of the other High Contracting Party.

Consequently, and in conformity with the spirit which animated the negotiation of the present Convention, the two Governments consider that they should reciprocally exercise the greatest possible [*29] liberality consistent with their national laws both with respect to the entry and sojourn of aliens and with respect to their establishment, effective reciprocity being understood by them as pertaining globally to the whole of the two systems of regulation.

The present Declaration shall be annexed to the Convention of Establishment between the United States of America and France dated the twenty-fifth of November, one thousand nine hundred fifty-nine.

Le President des Etats-Unis d'Amerique et le President de la Republique Francaise, President de la Communaute, desireux de renforcer les liens de paix et d'amitie qui existent tradition-nellement entre les deux pays, et d'encourager des relations economiques plus etroites entre leurs peuples, conscients de la contribution que peuvent apporter a ces fins des dispositions accordant dans chaque pays des

droits et des privileges reciproques au profit des ressortissants et des societes de l'autre pays, favorisant ainsi des investissements profitables pour les deux Hautes Parties Contractantes et des relations commerciales avantageuses pour elles, ont resolu de conclure une convention d'etablissement et, a cette fin, ont designe comme plenipotentiaires: [*30]

Le President des Etats-Unis d'Amerique,

l'Honorable AMORY HOUGHTON, Ambassadeur des Etats Unis d'Amerique a Paris,

et le President de la Republique Francaise, President de la Communaute,

M. MAURICE COUVE DE MURVILLE, Ministre des Affaires Etrangeres,

lesquels, apres s'etre mutuellement communique leurs pleins pouvoirs, reconnus en bonne et due forme, sont convenus des articles suivants:

ARTICLE I

Chacune des Hautes Parties Contractantes accorde un traitement equitable aux ressortissants et societes de l'autre Haute Partie Contractante, tant en ce qui concerne les personnes que les biens, entreprises et autres interets, et leur assure dans ses territoires la pleine protection legale et judiciaire.

ARTICLE II

1. Les ressortissants de chacune des Hautes Parties Contractantes sont, sous reserve de l'application des lois relatives a l'entree et au sejour des etrangers, autorises a entrer dans les territoires de l'autre Haute Partie Contractante, a y voyager librement et a y resider dans les lieux de leur choix. Ils sont en particulier autorises a entrer dans les territoires de l'autre Haute Partie Contractante et a s'y etablir, en vue de:

a) se livrer a des operations commerciales [*31] entre les territoires des deux Hautes Parties Contractantes ainsi qu'a des activites commerciales connexes;

b) developper et diriger les operations d'une entreprise dans laquelle ils ont deja investi un capital substantiel ou procedent a un tel investissement.

2. Les ressortissants de chacune des Hautes Parties Contractantes jouissent sur les territoires de l'autre Haute Partie Contractante des libertes de conscience, de culte, d'information et de presse.

3. Les dispositions du present article sont subordonnees au droit de chacune des Hautes Parties Contractantes de prendre les mesures necessaires au maintien de l'ordre public et a la protection de la sante, de la moralite et de la securite publiques.

ARTICLE III

1. Les ressortissants et societes de chacune des Hautes Parties Contractantes beneficient du traitement national en ce qui concerne l'acces aux tribunaux judiciaires ainsi qu'aux tribunaux et organismes administratifs situes dans les territoires de l'autre Haute Partie Contractante, a tous les degres de juridiction, en vue de l'exercice

tant actif que passif de leurs droits. Les societes de l'une des Hautes Parties Contractantes ne se livrant a aucune activite dans les [*32] territoires de l'autre Haute Partie Contractante n'ont pas a s'y faire immatriculer pour beneficier du meme privilege. Les ressortissants de chacune des Hautes Parties Contractantes beneficient sur les territoires de l'autre Haute Partie Contractante de l'assistance judiciaire dans les memes conditions que les nationaux.

2. Les contrats passes entre les ressortissants et societes de l'une des Hautes Parties Contractantes et les ressortissants et societes de l'autre Haute Partie Contractante, qui prevoient le reglement des litiges par voie d'arbitrage, ne sont pas reputes inapplicables dans les territoires de ladite autre Haute Partie Contractante pour le seul motif que le lieu designe pour la procedure d'arbitrage est situe en dehors desdits territoires, ou que la nationalite de l'un ou de plusieurs des arbitres n'est pas celle de ladite autre Haute Partie Contractante. Aucune sentence arbitrale, dument rendue conformement a un contrat de cette nature et qui serait definitive et executoire en vertu de la loi du lieu ou elle aura ete rendue, ne sera reputee nulle et ne sera privee de

moyens d'execution efficaces dans les territoires de chacune des Hautes Parties Contractantes pour [*33] le seul motif que le lieu ou la sentence a ete rendue est situe en dehors desdits territoires ou que la nationalite de l'un ou de plusieurs arbitres n'est pas celle de ladite Haute Partie Contractante.

ARTICLE IV

1. Les droits et interets legitimement acquis par les ressortissants et societes de l'une des Hautes Parties Contractantes ne seront pas compromis sur les territoires de l'autre Haute Partie Contractante par des mesures de caractere discriminatoire.

2. Les residences, bureaux, entrepots, usines et autres locaux des ressortissants et societes de l'une des Hautes Parties Contractantes situes dans les territoires de l'autre Haute Partie Contractante seront exempts de violation ou autres mesures injustifiees. Les perquisitions officielles dans lesdits locaux, lorsqu'elles seront necessaires, seront effectuees conformement a la loi et avec tous egards pour les commodites des occupants et la marche des affaires.

3. Les biens des ressortissants et des societes de l'une des Hautes Parties Contractantes ne feront pas l'objet d'une mesure d'expropriation dans les territoires de l'autre Haute Partie Contractante si ce n'est dans l'interet public et sous reserve d'une juste indemnite. [*34] Cette indemnite representera l'equivalent des biens expropries; elle sera accordee sous une forme effectivement realisable et sans retard inutile. Les dispositions adequates en vue de la fixation et du paiement de ladite indemnite devront etre prises au plus tard au moment de la depossession.

4. Les ressortissants et les societes de l'une des Hautes Parties Contractantes beneficient dans tous les cas, sur les territoires de l'autre Haute Partie Contractante, d'un traitement au moins aussi favorable que le traitement national en ce qui concerne les matieres visees aux paragraphes 2 et 3 du present article.

ARTICLE V

1. Les ressortissants et les societes de chacune des Hautes Parties Contractantes beneficient du traitement national en ce qui concerne

toutes les activites commerciales, industrielles, financieres et autres activites de caractere lucratif qu'ils exercent dans les territoires de l'autre Haute Partie Contractante soit directement, soit par l'intermediaire d'un agent ou de toute autre personne physique ou morale. En consequence, lesdits ressortissants et societes sont autorises sur lesdits territoires:

a) a creer et a entretenir des succursales, agences, bureaux, usines [*35] et autres etablissements appropries a la conduite de leurs affaires;

b) a creer des societes conformement a la legislation generale de ladite autre Haute Partie Contractante en matiere de societes, et a acquerir des interets majoritaires dans les societes de ladite autre Haute Partie Contractante;

c) a diriger et a gerer les entreprises qu'ils ont creees ou acquises.

En outre, les entreprises qu'ils dirigent, soit a titre de propriete

individuelle, de societe ou a tout autre titre, beneficient en ce qui concerne la conduite de leurs activites, d'un traitement non moins favorable que celui qui est accorde aux entreprises similaires dirigees par des ressortissants et societes de ladite autre Haute Partie Contractante.

2. Chaque Haute Partie Contractante se reserve le droit de determiner dans quelle mesure les etrangers peuvent sur ses territoires creer, diriger, gerer ou acquerir des interets dans des entreprises de communications, de transport par air ou par eau, de banque procedant a des operations de depot ou a des operations fiduciaires, d'exploitation du sol ou d'autres ressources naturelles et de production d'electricite.

3. Chacune des Hautes Parties Contractantes s'engage [*36] a ne pas aggraver sur ses territoires les limitations existantes a l'egard des entreprises appartenant a ou dirigees par des ressortissants et societes de l'autre Haute Partie Contractante qui s'y livrent deja aux activites enumerees au paragraphe precedent. En outre, chacune des Hautes

Parties Contractantes autorisera sur ses territoires les Societes de transport, de communications et de banque de l'autre Haute Partie Contractante a entretenir, conformement aux lois en vigueur, les succursales et agences necessaires aux operations de caractere essentiellement international auxquelles elles se livrent.

ARTICLE VI

1. Les ressortissants et les societes de chacune des Hautes Parties Contractantes peuvent a leur choix faire appel, sur les territoires de l'autre Haute Partie Contractante, a des experts-comptables et autres experts techniques, ainsi qu'a des Conseils juridiques et engager le personnel indispensable a la marche de l'entreprise en raison de ses capacites speciales. Mais ces personnes doivent remplir les conditions necessaires a l'exercice de leur profession, en application de la legislation en vigueur.

2. Toutefois, lesdits ressortissants et Societes sont autorises a faire [*37] appel a des experts-comptables et autres experts techniques n'ayant pas la nationalite de l'autre Haute Partie Contractante, sans consideration des titres qu'ils peuvent avoir a l'exercice d'une

profession sur les territoires de l'autre Haute Partie Contractante, mais exclusivement pour leur faire proceder, a des fins internes, a des etudes et examens a l'intention desdits ressortissants et societes.

ARTICLE VII

1. Les ressortissants et societes de chacune des Hautes Parties Contractantes beneficient sur les territoires de l'autre Haute Partie Contractante du traitement national pour la prise a bail, la jouissance et l'occupation d'immeubles de toute nature, a l'effet d'exercer les droits qui leur sont accordes par les autres articles de la presente convention. Ils y beneficient egalement de tous autres droits en ce qui concerne l'acquisition et la possession de biens immobiliers, qui sont reconnus aux ressortissants ou societes etrangers par la legislation de l'autre Haute Partie Contractante, chacune des Hautes Parties Contractantes se reservant d'invoquer la reciprocite a cet egard.

2. Les ressortissants et societes de chacune des Hautes Parties Contractantes beneficient sur [*38] les territoires de l'autre Haute

Partie Contractante du traitement national en ce qui concerne le droit d'acquerir la propriete ou la possession de tout bien mobilier corporel ou incorporel, ainsi que celui de louer lesdits biens, a l'exception des navires. Toutefois, chacune des Hautes Parties Contractantes peut imposer des restrictions a la possession par des etrangers de materiaux dangereux du point de vue de la securite publique ainsi qu'a la possession par des etrangers d'interets dans des entreprises se livrant a des activites d'un caractere particulier. Mais elle ne peut le faire que dans la mesure compatible avec l'exercice des droits et privileges definis a l'article V ou prevus par d'autres dispositions de la presente convention.

3. Les ressortissants et societes de chacune des Hautes Parties Contractantes recoivent sur les territoires de l'autre Haute Partie Contractante le traitement national en ce qui concerne le droit de disposer des biens de toute nature.

ARTICLE VIII

1. Les ressortissants et societes de chacune des Hautes Parties

Contractantes beneficient, dans les territoires de l'autre Haute Partie Contractante, du traitement national en ce qui concerne l'acquisition [*39] et la conservation des brevets d'invention et en ce qui concerne les droits attaches aux marques de fabrique ou de commerce, noms commerciaux et labels de garantie, ou qui relevent a quelque titre que ce soit de la propriete industrielle.

2. Les Hautes Parties Contractantes s'engagent a cooperer en vue de favoriser l'echange et l'utilisation des connaissances scientifiques et techniques afin notamment de permettre l'accroissement de la productivite et l'amelioration du niveau de vie dans leurs territoires respectifs.

ARTICLE IX

1. a) Les ressortissants de l'une des Hautes Parties Contractantes residant sur les territoires de l'autre Haute Partie Contractante,

b) Les ressortissants de l'une des Hautes Parties Contractantes ne residant pas sur les territoires de l'autre Haute Partie Contractante

mais s'y livrant au commerce ou a d'autres operations lucratives en utilisant ou non une installation fixe d'affaires ou une base fixe d'activite,

c) Les societes de l'une des Hautes Parties Contractantes se livrant dans les territoires de l'autre Haute Partie Contractante au commerce ou a d'autres activites lucratives en utilisant ou non une installation fixe d'affaires ou une base fixe [*40] d'activite,

d) Les associations de l'une des Hautes Parties Contractantes se livrant dans les territoires de l'autre Haute Partie Contractante a des activites scientifiques, pedagogiques, religieuses ou philantropiques en utilisant ou non une base fixe d'activite,

ne seront soumis sur les territoires de cette autre Haute Partie Contractante a aucune imposition ou obligation y relative, qui soit plus lourde que celle a laquelle sont ou pourront etre assujettis les ressortissants, les societes et les associations de ladite autre Haute Partie Contractante se trouvant dans la meme situation.

2. Les ressortissants, les Societes et Associations de l'une des Hautes Parties Contractantes qui n'entrent pas dans l'une des categories prevues au paragraphe 1 ne seront pas assujettis, sur les territoires de l'autre Haute Partie Contractante, a des impositions ou obligations y relatives qui soient plus lourdes que celles auxquelles sont ou pourront etre assujettis les ressortissants, societes et associations d'un tiers pays quelconque qui se trouveraient dans la meme situation.

3. Les entreprises de l'une des Hautes Parties Contractantes dont le capital est en totalite ou en partie, directement [*41] ou indirectement detenu ou controle par un ou plusieurs ressortissants de l'autre Haute Partie Contractante, ne seront soumises dans la premiere Haute Partie Contractante a aucune imposition ou obligation y relative qui soit plus lourde que celle a laquelle sont ou pourront etre assujetties les autres entreprises de meme nature de cette premiere Haute Partie Contractante.

4. Les ressortissants, les societes et les associations d'une Haute

Partie Contractante vises au paragraphe 1, sous les alineas b), c) et d) du present article ne seront assujettis, sur les territoires de l'autre Haute Partie Contractante, aux impositions frappant le capital, les revenus ou benefices, ou qui sont etablies sur toutes autres bases, qu'a raison des biens qu'ils y possedent, des revenus et benefices qu'ils y realisent, des affaires qu'ils y traitent, des operations qu'ils y font ou de toutes autres bases d'imposition en relation directe avec leurs activites dans ces territoires.

5. Le terme "imposition" designe dans le present article les impots de toute nature ou denomination.

6. Chaque Haute Partie Contractante se reserve le droit

a) de conceder aux ressortissants, societes et associations de pays [*42] tiers des avantages fiscaux particuliers sur la base de la reciprocite;

b) d'accorder des avantages fiscaux speciaux en vertu d'accords conclus avec des pays tiers en vue d'eviter la double imposition;

c) de prendre des dispositions speciales tendant a faire beneficier des non-residents d'exonerations de caractere personnel en matiere d'impot sur le revenu et d'impot sur les successions;

d) d'accorder des avantages speciaux a ses propres ressortissants et residents en matiere de declarations conjointes souscrites par des epoux.

7. Les dispositions qui precedent ne font pas obstacle a la perception, le cas echeant, de taxes afferentes a l'accomplissement des formalites de police ou de toute autre formalite, si ces taxes sont egalement percues sur les autres etrangers. Le taux de ces taxes ne pourra etre superieur a celui des taxes percues sur les ressortissants de tout autre pays.

ARTICLE X

1. Les ressortissants et societes de chacune des Hautes Parties Contractantes beneficient de la part de l'autre Haute Partie

Contractante du meme traitement que les ressortissants et societes de cette derniere se trouvant dans des situations similaires, en ce qui concerne les paiements, remises [*43] et transferts de fonds ou de moyens de paiement entre les territoires des deux Hautes Parties Contrac tantes ainsi qu'entre les territoires de l'autre Haute Partie Contractante et ceux d'un pays tiers. Ce traitement ne peut pas etre moins favorable que celui qui serait accorde aux ressortissants et societes se trouvant dans des situations similaires et relevant d'un pays tiers.

2. Aucune des Hautes Parties Contractantes n'imposera, en matiere de changes, de restrictions telles que definies au paragraphe 5 du present article, si ce n'est dans la mesure qui serait requise pour empecher ses reserves monetaires de tomber a un niveau tres bas, ou en vue de realiser un accroissement modere de ses reserves monetaires insuffisantes. Les dispositions du present article ne modifient pas les obligations que l'une des Hautes Parties Contractantes a pu contracter a l'egard du Fonds monetaire international, et n'excluent pas l'adoption de restrictions particulieres

lorsque le Fonds aura specialement autorise ou invite l'une des Hautes Parties Contractantes a imposer de telles restrictions.

3. Les deux Hautes Parties Contractantes, reconnaissant que la liberte des mouvements de capitaux d'investissement [*44] et des revenus correspondants est susceptible de permettre la realisation des objectifs de la presente convention, conviennent que lesdits mouvements ne seront pas inutilement entraves. Dans cet esprit, chacune des Hautes Parties Contractantes s'efforcera d'accorder, dans toute la mesure du possible, aux ressortissants et societes de l'autre Haute Partie Contractante, la faculte d'effectuer des investissements et de retransferer le produit de leur liquidation. Ce principe s'applique egalement a l'indemnite visee a l'article IV paragraphe 3 de la presente convention.

Chacune des Hautes Parties Contractantes accordera des facilites raisonnables pour le transfert des gains provenant d'investissements sous la forme de salaires, dividendes, interets, commissions, redevances, remunerations pour services techniques, ou des sommes correspondant a d'autres transactions courantes en matiere

d'investissements. Si les taux de change en vigueur sont multiples, le taux applicable a de tels retraits sera le taux expressement approuve par le Fonds monetaire international pour des transactions de cette nature ou, en l'absence d'un taux ainsi approuve, un taux qui, compte tenu de toutes taxes et surtaxes [*45] sur les transferts de devises, sera juste et raisonnable.

4. Aucune des Hautes Parties Contractantes n'imposera de restrictions de change, d'une maniere inutilement prejudiciable ou arbitrairement discriminatoire en matiere de creances, investissements, transports, commerce et en ce qui concerne les autres interets des ressortissants et societes de l'autre Haute Partie Contractante ou a l'egard de la position concurrentielle de ladite autre Haute Partie Contractante.

5. L'expression "restriction de change" figurant au present article comprend toutes restrictions, droits et taxes, tous reglements ou autres exigences imposes par l'une ou l'autre Haute Partie Contractante, affectant ou entravant les paiements, remises ou

transferts de fonds ou de moyens de paiement entre les territoires des deux Hautes Parties Contractantes.

ARTICLE XI

Chacune des Hautes Parties Contractantes prendra les mesures qu'elle estimera appropriees, afin d'empecher les pratiques ou arrangements commerciaux, qu'ils soient le fait d'une ou plusieurs entreprises privees ou publiques, qui entravent la concurrence, restreignent l'acces aux marches ou favorisent un controle tendant a instituer un monopole, dans [*46] tous les cas ou ces pratiques ou arrangements ont ou pourraient avoir des effets nuisibles aux echanges commerciaux entre les deux pays.

ARTICLE XII

1. Aucune disposition de la presente convention ne fait obstacle a l'application de mesures:

a) reglementant l'importation et l'exportation de l'or et de l'argent;

b) relatives aux substances fissiles, aux sous-produits radioactifs resultant de l'utilisation ou de la transformation desdites substances, ou aux matieres premieres qui sont a la base des substances fissiles;

c) reglementant la fabrication et le commerce des armes, munitions et materiels de guerre, ainsi que le commerce d'autres materiels effectue directement ou indirectement en vue d'approvisionner des installations militaires;

d) necessaires pour l'execution des obligations souscrites par l'une des Hautes Parties Contractantes en vue du maintien ou du retablissement de la paix et de la securite internationales, ou necessaires a la protection de ses interets essentiels en matiere de securite.

ARTICLE XIII

Les Hautes Parties Contractantes peuvent refuser a toute societe dans laquelle des ressortissants d'un ou plusieurs pays tiers ont directement ou indirectement un [*47] interet preponderant du fait de

leur participation au capital ou a la direction de ladite societe, les avantages de la presente convention, sauf en ce qui concerne la reconnaissance de la personnalite morale et l'acces aux Tribunaux.

ARTICLE XIV

1. L'expression "traitement national" signifie le traitement accorde aux ressortissants et societes d'une des Hautes Parties Contractantes sur les territoires de l'autre Haute Partie Contractante dans des conditions non moins favorables que le traitement qui y est accorde, dans des situations similaires, aux ressortissants et societes, selon le cas, de cette derniere Haute Partie Contractante.

2. Le traitement national accorde en vertu des dispositions de la presente convention aux societes francaises est dans tout Etat, tout territoire ou toute possession des Etats-Unis d'Amerique, le traitement qui y est accorde aux Societes constituees dans les autres Etats, territoires et possessions des Etats-Unis d'Amerique.

3. Aux fins de la presente convention: le terme "ressortissants"

("nationals") designe les personnes physiques possedant la nationalite de l'une des Hautes Parties Contractantes et ne residant pas habituellement sur un territoire [*48] non metropolitain de ce pays auquel ne s'applique pas la presente convention.

4. Aux fins de la presente convention, le terme "societe" ("company") designe:

a) en ce qui concerne les Etats-Unis d'Amerique, les "corporations", "partnerships", "limited liability companies" et autres personnes morales a responsabilite limitee ou non, mais a but lucratif;

b) en ce qui concerne la France, les societes civiles, les societes en nom collectif, les associations en participation, les Societes en commandite simple, les Societes en commandite par actions, les Societes anonymes, les Societes a responsabilite limitee et en general les personnes morales a but lucratif.

5. Les Societes constituees, conformement aux lois et reglements en

vigueur, dans les territoires de l'une des Hautes Parties Contractantes sont reputees etre des societes de ladite Haute Partie Contractante et voient leur personnalite morale reconnue dans les territoires de l'autre Haute Partie Contractante.

6. Les Associations a but non lucratif legalement constituees sur le territoire de l'une des Hautes Parties Contractantes voient leur personnalite morale reconnue par l'autre Haute Partie Contractante et beneficient notamment [*49] dans ces territoires des dispositions de l'article III paragraphe 1 de la presente convention.

ARTICLE XV

1. La presente convention est applicable:

a) En ce qui concerne les Etats-Unis d'Amerique, a tous les territoires places sous leur souverainete ou leur autorite a l'exclusion de la zone du canal de Panama et du territoire sous tutelle des Iles du Pacifique.

b) En ce qui concerne la Republique Francaise, aux departements

metropolitains, aux departements algeriens, aux departements des Oasis et de la Saoura, aux departements de la Guadeloupe, de la Martinique, de la Guyane et de la Reunion.

2. La presente convention pourra etre rendue applicable, en vertu d'echanges de lettres entre les Gouvernements des deux Hautes Parties Contractantes, aux Territoires d'Outre-Mer de la Republique Francaise ou a l'un ou a plusieurs d'entre eux, selon les modalites fixees, dans chaque cas, auxdits echanges de lettres.

3. La presente convention pourra, dans les memes conditions, etre rendue applicable aux Etats-membres de la Communaute ou a l'un ou a plusieurs d'entre eux.

ARTICLE XVI

1. Chacune des Hautes Parties Contractantes accordera une consideration bienveillante a toute representation [*50] que l'autre Haute Partie Contractante pourra faire concernant toute question interessant l'application de la presente Convention et se pretera a des

echanges de vues a ce sujet.

2. Tout litige entre les Hautes Parties Contractantes relativement a l'interpretation ou a l'application de la presente Convention, qui n'aura pas fait l'objet d'un reglement satisfaisant par la voie diplomatique, sera soumis a la Cour Internationale de Justice, a moins que les Hautes Parties Contractantes ne se mettent d'accord pour aboutir a un reglement par tout autre moyen pacifique.

ARTICLE XVII

L'entree en vigueur de la presente Convention met fin aux effets de la Convention pour la garantie reciproque de la propriete des marques de fabrique, signee a Washington le 16 avril 1869.

ARTICLE XVIII

1. La presente Convention sera ratifiee. Elle entrera en vigueur un mois apres l'echange des instruments de ratification qui aura lieu a Washington.

2. La presente Convention aura une duree initiale de dix ans. Elle restera en vigueur apres ce terme a moins que l'une des Hautes Parties Contractantes n'en fasse cesser les effets apres avoir informe l'autre Haute Partie Contractante par ecrit et avec un preavis [*51] d'un an.

En foi de quoi les Plenipotentiaires respectifs ont signe la presente Convention et y ont appose leurs sceaux.

Fait en double exemplaire, en langue anglaise et francaise, les deux textes faisant egalement foi,

a Paris, le vingt-cinq Novembre mil neuf cent cinquante neuf.

PROTOCOLE

Les Plenipotentiaires soussignes, dument autorises par leurs Gouvernements respectifs, sont egalement convenus des dispositions suivantes, qui font partie integrante de la Convention d'Etablissement entre les Etats-Unis d'Amerique et la France en date du vingt-cinq

Novembre mil neuf cent cinquante neuf.

1. a) La protection stipulee a l'article 1 entraine pour les autorites competentes de chacune des Hautes Parties Contractantes l'obligation d'informer immediatement les Consuls de l'autre Haute Partie Contractante de l'arrestation ou de la detention d'un de ses ressortissants si celui-ci en fait la demande. Le Consul peut alors etre autorise a visiter ce ressortissant conformement aux reglements de l'etablissement de detention et a s'entretenir avec lui. Toute correspondance adressee par ce ressortissant au Consul lui sera transmise par les soins de l'autorite competente.

b) Ce ressortissant [*52] aura droit aux garanties accordees par les lois de la Haute Partie Contractante sur les territoires de laquelle il est detenu et qui assurent aux prevenus un traitement humain, le droit d'etre immediatement informes des accusations formulees contre eux, de faire assumer leur defense par un avocat de leur choix, et d'etre juges aussi rapidement que possible.

2. a) Nonobstant les dispositions de la presente Convention, les dispositions legales et reglementaires en vigueur sur les territoires de l'une des Hautes Parties Contractantes et regissant l'acces des etrangers aux professions salariees et non salariees, ainsi que l'exercice par eux de ces professions et autres activites, restent applicables aux ressortissants et societes de l'autre Haute Partie Contractante.

b) Toutefois, les dispositions prevues par les lois et reglements precites ainsi que celles prevues par les lois et reglements sur l'admission et le sejour des etrangers ne doivent pas avoir pour effet de porter atteinte a l'essentiel des droits mentionnes a l'article II, paragraphe 1 a et b.

c) Les dispositions de l'article II paragraphe 1 b sont considerees comme s'etendant aux ressortissants de l'une des Hautes Parties [*53] Contractantes se rendant sur les territoires de l'autre Haute Partie Contractante afin d'y occuper un poste de responsabilite dans une entreprise pour le compte des ressortissants et societes de la premiere

Haute Partie Contractante, qui ont deja investi un capital substantiel dans cette entreprise, ou procedent a un tel investissement.

d) Les avantages accordes en matiere d'admission et de sejour dans les territoires de l'une des Hautes Parties Contractantes a un ressortissant de l'autre Haute Partie Contractante appele a beneficier des dispositions de l'article II paragraphe 1 a et b s'etendent a son epouse et a ses enfants mineurs non maries qui l'accompagnent ou viennent le rejoindre.

3. La disposition de l'article III paragraphe 1 relative a l'acces aux tribunaux n'affecte pas les regles en vigueur sur les territoires de chacune des Hautes Parties Contractantes en matiere de caution judicatum solvi.

4. Les dispositions de l'article III paragraphe 2 in fine ne portent pas atteinte a la reserve relative aux territoires sur lesquels la sentence est rendue, formulee par la France en sdherant a la Convention de New York du 10 juin 1958 pour la reconnaissance et l'execution des

sentences [*54] arbitrales etrangeres.

5. Dans l'article IV, paragraphe 3, le terme "expropriation . . . dans l'interet public" designe egalement les nationalisations.

6. Les dispositions de l'article IV, paragraphe 3, prevoyant le paiement d'indemnites, s'etendent aux interet detenus directement ou indirectement par des ressortissants et des Societes de l'une des Hautes Parties Contractantes dans des biens expropries dans les territoires de l'autre Haute Partie Contractante.

7. Les dispositions de l'article V paragraphe 1 ne portent pas atteinte aux dispositions legales et reglementaires en vigueur sur les territoires de l'une des Hautes Parties Contractantes et reservant certaines professions aux nationaux.

8. Les dispositions de l'article V paragraphe 1 ne font pas obstacle au droit pour les Hautes Parties Contractantes d'appliquer des dispositions speciales aux societes d'assurances etrangeres afin que

celles-ci fournissent, dans l'interet des assures et des tiers, des garanties equivalentes a celles qui sont requises des societes nationales.

9. Les dispositions de l'article VI paragraphe 2 sont adoptees, en ce qui concerne les experts-comptables et comptables agrees, jusqu'au moment ou il aura [*55] ete possible de conclure un accord sur l'exercise de cette profession.

10. Le droit d'invoquer la reciprocite prevu a l'article VII paragraphe 1, permet au Gouvernement francais, compte tenu du traitement accorde aux societes et ressortissants francais dans un Etat, possession ou territoire des Etats-Unis d'Amerique, d'appliquer un traitement analogue aux ressortissants et societes des Etats-Unis d'Amerique, respectivement domicilies dans l'Etat, possession ou territoire en question ou constituees suivant sa legislation.

11. Dans le cas ou une societe ou un ressortissant francais ayant acquis des biens immobiliers par succession ou par testament, perdraient, en raison de leur qualite d'etrangers, la faculte d'exercer

leurs droits de propriete sur ces biens dans un Etat, territoire ou possession des Etats-Unis d'Amerique, ils obtiendraient un delai d'au moins cinq ans pour en disposer.

12. Les dispositions de l'article VII paragraphe 2 et 3 ne font pas obstacle a l'application des textes reglementant les transactions effectuees par les non residents et les personnes de nationalite etrangere sur les valeurs mobilieres etrangeres.

13. Les dispositions de l'article X, paragraphe 1 ne [*56] font pas obstacle a l'application aux diverses monnaies de traitements differents, selon que l'exige l'etat de la balance des paiements de l'une ou l'autre Haute Partie Contractante.

14. Chacune des Hautes Parties Contractantes peut, en vue de proteger sa monnaie ou de faciliter le service des revenus d'investissements et le retransfert du capital, subordonner a autorisation les constitutions d'investissements par des ressortissants et societes etrangers.

15. L'expression "dans toute la mesure du possible" figurant a l'article X, paragraphe 3, s'entend reference faite aux conditions mentionnees a l'article X paragraphe 2.

16. Le critere de residence peut servir a apprecier si les ressortissants et les Societes de chacune des Hautes Parties Contractantes se trouvent ou non dans des "situations similaires" au sens du paragraphe 1 de l'article XIV et des autres dispositions de la presente convention.

17. L'article XV ne s'applique pas aux territoires qui sont soumis a l'autorite de l'une des Hautes Parties Contractantes uniquement en tant que base militaire ou en raison d'une occupation militaire temporaire.

En foi de quoi, les Plenipotentiaires respectifs ont signe le present Protocole [*57] et y ont appose leurs sceaux.

Fait en double exemplaire, en langue anglaise et francaise, les deux

textes faisant egalement foi,

a Pari, le vingt-cinq Novembre mil neuf cent cinquante neuf.

DECLARATION COMMUNE

Les deux Gouvernements jugent utile que soit precisee, au moment de la signature de la Convention d'Etablissement entre les Etats-Unis d'Amerique et la France, la portee des reserves relatives d'une part a l'application des lois concernant l'admission et le sejour des etrangers et, d'autre part, a l'application des lois reglementant l'acces des etrangers aux professions salariees et non salariees.

Il est expressement stipule dans le Protocole de la Convention que ces reserves ne peuvent porter atteinte a l'essentiel des droits reconnus aux ressortissants de l'une des Hautes Parties Contractantes qui ont deja investi un capital substantiel ou procedent a un tel investissement sur les territoires de l'autre Haute Partie Contractante, ou qui s'y rendent en vue d'exercer des activites commerciales entre les territoires des deux Hautes Parties Contractantes.

Mais l'intention des deux Gouvernements est egalement de faciliter, dans toute la mesure du possible et sur la base d'une [*58] reciprocite reelle et effective, l'etablissement des ressortissants qui ne rentrent pas dans les categories precitees, et en particulier du personnel qualifie indispensable a la marche des entreprises creees par les ressortissants et societes de l'une des Hautes Parties Contractantes sur les territoires de l'autre Haute Partie Contractante.

En consequence, et conformement a l'esprit qui a preside a la negociation de la presente Convention, les deux Gouvernements estiment qu'ils devront faire reciproquement l'usage le plus liberal possible des pouvoirs que leur donnent leurs legislations nationales en ce qui concerne tant l'entree et le sejour que l'etablissement des etrangers, la reciprocite effective etant entendue par eux comme portant globalement sur l'ensemble de ces deux ordres de reglementations.

La presente declaration sera annexee a la Convention d'Etablissement entre les Etats-Unis d'Amerique et la France en date

du vingt-cinq Novembre mil neuf cent cinquante neuf.

WHEREAS the Senate of the United States of America by their resolution of August 17, 1960, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said convention, [*59] together with the said protocol and joint declaration;

WHEREAS the said convention, together with the said protocol and joint declaration, was ratified by the President of the United States of America on August 29, 1960, in pursuance of the aforesaid advice and consent of the Senate, and was ratified by the President of the French Republic, President of the Community, on October 28, 1960;
WHEREAS the respective instruments of ratification of the said convention, protocol, and joint declaration were duly exchanged at Washington on November 21, 1960;

AND WHEREAS it is provided in Article XVIII of the said convention that the convention shall enter into force one month after

the exchange of the instruments of ratification and in the said protocol that the provisions thereof shall form an integral part of the convention, and the said joint declaration is annexed to and deemed to be an integral part of the convention;

NOW, THEREFORE, be it known that I, Dwight D. Eisenhower, President of the United States of America, do hereby proclaim and make public the said convention, protocol, and joint declaration to the end that the same and every article and clause thereof may be observed and fulfilled [*60] in good faith on and after December 21, 1960, one month after the exchange of the instruments of ratification, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eighth day of December in the year of our Lord one thousand nine hundred and sixty and of the

Independence of the United States of America the one hundred eighty-fifth.

SIGNATORIES:

AMORY HOUGHTON

[SEAL]

M COUVE DE MURVILLE

[SEAL]

[SEAL]

DWIGHT D EISENHOWER

By the President:

CHRISTIAN A. HERTER

Secretary of State

*8 U.S.T. 2217; 1956 U.S.T. LEXIS 218, **

LEXSEE 8 U.S.T. 2217

U.S. Treaties on LEXIS

REPUBLIC OF KOREA

Friendship, Commerce and Navigation

TIAS 3947

8 U.S.T. 2217; 1956 U.S.T. LEXIS 218

November 28, 1956, Date-Signed

November 7, 1957, Date-In-Force

STATUS:

[*1] Treaty and protocol signed at Seoul November 28, 1956;

Ratification advised by the Senate of the United States of America August 8, 1957;

Ratified by the President of the United States of America August 30, 1957;

Ratified by the Republic of Korea October 2, 1957;

Ratifications exchanged at Seoul October 7, 1957;

Proclaimed by the President of the United States of America November 15, 1957;

Entered into force November 7, 1957.

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA

[FOREIGN LANGUAGE TEXT OMITTED]

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a treaty of friendship, commerce and navigation between the United States of America and the Republic of Korea, together with a protocol relating thereto, was signed at Seoul on November 28, 1956;

WHEREAS the originals of the said treaty and protocol, in the

English and Korean languages, are word for word as follows:

The United States of America and the Republic of Korea, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples, and being [*2] cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries,

The United States of America:

Walter Dowling, Ambassador Extraordinary and Plenipotentiary of the United States of America to the

Republic of Korea, and

The Republic of Korea:

CHO Chung-whan, Acting Minister of Foreign Affairs of the Republic of Korea,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

ARTICLE I

Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.

ARTICLE II

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying [*3] on trade between the territories of the two Parties and

engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

3. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.

ARTICLE III

1. Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and [*4] shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

ARTICLE IV

1. Nationals of either Party shall be accorded national treatment in

the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals [*5] of either Party within the territories of the other Party shall be accorded national treatment in the application of laws and regulations establishing compulsory systems of social security, under which benefits are paid without an individual test of financial need: (a) against loss of wages or earnings due to old age, unemployment, sickness or disability, or (b) against loss of financial support due to the death of father, husband or other person on whom such support had depended.

ARTICLE V

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies

within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration [*6] of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invaiid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.

ARTICLE VI

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to molestation or to entry without just cause. Official searches and examinations of such premises and their contents; when necessary, shall be made only [*7] according to law and with careful regard for the convenience of the occupants and the conduct of business.

3. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied.

4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which nationals and [*8] companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

ARTICLE VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the [*9] form of individual proprietorships, companies or otherwise, shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

2. Each Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in transport, communications, public utilities, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations [*10] in which they are permitted to engage.

3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises

within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

ARTICLE VIII

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals [*11] and companies in connection with the planning and

operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party. Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.

ARTICLE IX

1. Nationals and companies of either Party shall be accorded, within the territories of the other Party: (a) national treatment with respect to leasing land, buildings and other immovable property appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in immovable property permitted by the applicable laws of the

other Party.

2. Nationals and companies of either Party shall be accorded within the [*12] territories of the other Party national treatment and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, movable property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activity, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

3. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring property of all kinds by testate or intestate succession or through judicial process. Should they because of their alienage be ineligible to continue to own any such property, they shall be

allowed a period of at least five years in which to dispose of it.

4. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to [*13] disposing of property of all kinds.

ARTICLE X

1. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names, trade labels and industrial property of every kind.

2. The Parties undertake to cooperate in furthering the interchange and use of scientific and technical knowledge, particularly in the interests of increasing productivity and improving standards of living within their respective territories.

ARTICLE XI

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those [*14] borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies of either Party engaged in trade or other gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose [*15] or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

5. Each Party reserves the right to: (a) extend specific tax advantages on the basis of reciprocity; (b) accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and (c) apply special provisions in allowing, to non-residents, exemptions of a personal nature in connection with income and inheritance taxes.

ARTICLE XII

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions [*16] as defined in paragraph 5 of the present Article except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. It is

understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with paragraph 2 of the present Article, it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people and necessary to the avoidance of serious economic instability, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 4, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, [*17] depreciation of direct investments, and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate

applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two Parties.

6. Each Party shall afford the other Party adequate opportunity for

consultation at any time regarding application of the present Article. [*18]

ARTICLE XIII

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in paragraph 5 of Article XI, taxes and charges applicable to them, their samples and the taking of orders, and regulations governing the exercise of their functions.

ARTICLE XIV

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, with respect to customs duties and charges of any

kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation.

2. Neither [*19] Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

3. If either Party imposes quantitative restrictions on the importation or exportation of any product in which the other Party has an important interest:

(a) It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any

change in such amount or period; and

(b) If it makes allotments to any third country, it shall afford such other Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due consideration being given to any special factors affecting the trade in such product.

4. Either Party may impose prohibitions or restrictions on the importation or exportation of any product on sanitary or other customary grounds of a non-commercial nature, or in the [*20] interest of preventing deceptive or unfair practices, provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other Party.

5. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

6. The provisions of the present Article shall not apply to advantages accorded by either Party:

(a) to products of its national fisheries;

(b) to adjacent countries in order to facilitate frontier traffic; or

(c) by virtue of a customs union or free-trade area of which it may become a member, so long as it informs the other Party of its plans and affords such other Party adequate opportunity for consultation.

7. Notwithstanding the provisions of paragraphs 2 and 3 (b) of the present Article, a Party may apply restrictions or controls on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions applied pursuant to Article XII. However, such restrictions or controls shall not depart further than necessary from the above paragraphs and [*21] shall be conformable to a policy designed to promote the maximum development of nondiscriminatory foreign

trade and to expedite the attainment both of a balance-of-payments position and of monetary reserves which will obviate the necessity of such restrictions.

ARTICLE XV

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to rates of duty, taxes or other charges, to the classification of articles for customs purposes, and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner. As a general practice, new administrative requirements or restrictions affecting imports, with the exception of those imposed on sanitary grounds or for reasons of public safety, shall not go into effect before the expiration of 30 days after publication, or alternatively, shall not apply to products en route at time of publication.

2. Each Party shall provide an appeals procedure under which

nationals and companies of the other Party, and importers of products [*22] of such other Party, shall be able to obtain prompt and impartial review, and correction when warranted, of administrative action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities. Penalties imposed for infractions of the customs and shipping laws and regulations concerning documentation shall, in cases resulting from clerical errors or when good faith can be demonstrated, be no greater than necessary to serve merely as a warning.

3. Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party. The present paragraph is subject to the provisions of Article XII.

ARTICLE XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the [*23] other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

ARTICLE XVII

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce

of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce [*24] of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of concessions and other government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

ARTICLE XVIII

1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control,

and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself [*25] or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

ARTICLE XIX

1. Between the territories of the two Parties there shall be freedom of

commerce and navigation.

2. Vessels under the flag or either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party; but each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either Party shall be accorded national treatment and most-favored-nation [*26] treatment by the other Party with respect

to the right to carry all products that may be carried by vessel to or from the territories of such other Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other Party, and shall receive friendly treatment and assistance.

6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

ARTICLE XX

There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit:

(a) for nationals of the other Party, together with their baggage;

(b) for other persons, together with their baggage, en route to or from the territories [*27] of such other Party; and

(c) for products of any origin en route to or from the territories of such other Party.

Such persons and things in transit shall be exempt from customs duties, from duties imposed by reason of transit, and from unreasonable charges and requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to measures referred to in paragraph 3 of Article II, and to nondiscriminatory regulations necessary to prevent abuse of the transit privilege.

ARTICLE XXI

1. The present Treaty shall not preclude the application of measures:

(a) regulating the importation or exportation of gold or silver;

(b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials;

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its [*28] essential security interests; and

(e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of

juridical status and with respect to access to courts.

2. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by the United States of America or its Territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

3. The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement. Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement.

4. Nationals of either Party admitted into the territories of the other Party [*29] for limited purposes shall not enjoy rights to engage in

gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance.

ARTICLE XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary

profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National [*30] treatment accorded under the provisions of the present Treaty to companies of the Republic of Korea shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

ARTICLE XXIII

The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands.

ARTICLE XXIV

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

ARTICLE XXV

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Seoul [*31] as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Korean languages, both equally authentic, at Seoul, this twenty-eighth day of November, one thousand nine hundred fifty six.

PROTOCOL

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Korea, the undersigned Plenipotentiaries, duly authorized by their respective Governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

1. The provisions of Article II, paragraph 1 (b), shall be construed as extending to a national of either Party seeking to enter the territories of the other [*32] Party solely for the purpose of developing and directing the operations of an enterprise in the territories of such other Party in which his employer has invested or is actively in the process of investing a substantial amount of capital, provided that such employer is a national or company of the same nationality as the applicant and that the applicant is employed by such national or company in a responsible capacity.

2. The term "access" as used in Article V, paragraph 1, comprehends, among other things, legal aid and security for costs and judgment.

3. It is understood that Article V, paragraph 2, does not require a Party to enforce an arbitration award that is contrary to its public policy.

4. The provisions of Article VI, paragraph 4, providing for the payment of compensation shall extend to interests held directly or

indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

5. The term "public utilities" as used in Article VII, paragraph 2, is deemed to include enterprises engaged in furnishing water supplies, or in manufacturing and distributing gas or electricity, to the general public.

6. With reference to [*33] Article VII, paragraph 4, it is understood that neither Party is obligated to accord most-favored-nation treatment regarding rights to engage in mining on the public domain other than on a basis of reciprocity.

7. Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, paragraph 2.

8. The provisions of Article XVII, paragraph 2 (b) and (c), and of Article XIX, paragraph 4, shall not apply to postal services.

9. Article XXI, paragraph 1 (e), shall be construed to apply also to any company in the ownership or direction of which any third country or companies thereof have directly or indirectly the controlling interest. A Party is not obligated to permit nationals of the other Party to conduct business within its territories as representatives of a third country or nationals or companies thereof in contravention of laws generally applicable to all individuals.

10. The provisions of Article XXI, paragraph 2, shall apply in the case of Puerto Rico regardless of any change that may take place in its political status.

11. Article XXIII does not apply to territories under the authority of either [*34] Party solely as a military base or by reason of temporary military occupation.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Korean languages, both equally authentic, at Seoul, this twenty-eighth day of November, one thousand nine hundred fifty six.

[FOREIGN LANGUAGE TEXT OMITTED]

WHEREAS the Senate of the United States of America by their resolution of August 8, 1957, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said treaty, together with the said protocol;

WHEREAS the said treaty and protocol were ratified by the President of the United States of America on August 30, 1957, in pursuance of the aforesaid advice and consent of the Senate, and have been duly ratified on the part of the Republic of Korea;

WHEREAS the respective instruments of ratification of the said treaty and protocol were duly exchanged at Seoul on October 7, 1957;

AND WHEREAS it is provided in Article XXV of the said treaty that the treaty shall enter into force one month after the day of exchange of ratifications, and it is provided in the said [*35] protocol that the provisions thereof shall be considered integral parts of the said treaty;

NOW, THEREFORE, be it known that I, Dwight D. Eisenhower, President of the United States of America, do hereby proclaim and make public the said treaty and the said protocol to the end that the same and every article and clause thereof may be observed and fulfilled in good faith on and after November 7, 1957, one month after the day of exchange of ratifications, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fifteenth day of November in

the year of our Lord one thousand nine hundred fifty-seven and of the Independence of the United States of America the one hundred eighty-second.

[SEAL]

SIGNATORIES:

FOR THE UNITED STATES OF AMERICA:

WALTER DOWLING

FOR THE REPUBLIC OF KOREA:

CHUNG W. CHO

[SEAL]

[FOREIGN LANGUAGE TEXT OMITTED]

[SEAL]

DWIGHT D EISENHOWER

By the President:

JOHN FOSTER DULLES

Secretary of State

LEXSEE 5 U.S.T. 1829

U.S. Treaties on LEXIS

GREECE

FRIENDSHIP, COMMERCE AND NAVIGATION

TIAS 3057

5 U.S.T. 1829; 1951 U.S.T. LEXIS 560

August 3, 1951, Date-Signed

October 13, 1954, Date-In-Force

STATUS:

[*1] Treaty between the UNITED STATES OF AMERICA and GREECE

Signed at Athens August 3, 1951

Ratification advised by the Senate of the United States of America, with a reservation, July 21, 1953

Ratified by the President of the United States of America, subject to

the said reservation, June 24, 1954

Ratified by Greece September 10, 1954

Ratifications exchanged at Athens September 13, 1954

Proclaimed by the President of the United States of America October 18, 1954

Entered into force October 13, 1954

and

Exchange of Notes

Dated at Athens August 3 and December 26, 1951

[NO LONG-TITLE IN ORIGINAL]

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a treaty of friendship, commerce and navigation between the United States of America and the Kingdom of Greece was signed at Athens on August 3, 1951, the original of which treaty, in the English and Greek languages, is word for word as follows:

[FOREIGN LANGUAGE TEXT OMITTED]

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF GREECE

The United States of America and the Kingdom of Greece, desirous of strengthening the bonds of peace and friendship traditionally existing between [*2] them and of promoting their economic development and the general velfare of their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements which facilitate and encourage, on bases mutually advantageous, the flow of investment capital and of technology and the further development of productive enterprise and commercial intercourse, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of unconditional most-favored-nation treatment reciprocally accorded, and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America: The Honorable JOHN E. PEURIFOY, Ambassador Extraordinary and Plenipotentiary of the United States of America to Greece, and

His Majesty the King of the Hellenes: His Excellency SOPHOCLES VRNIZELOS, Prime Minister and Minister of Foreign Affairs, who having communicated to each other their full powers found in good and due form, have agreed upon the following articles:

Article I

Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals [*3] and companies of the other Party.

Article II

1. Nationals of either Party shall be permitted freely to enter the territories of the other Party, to travel therein, to reside therein at places of their choice, and to depart therefrom.

2. There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit:

(a) for nationals of the other Party together with their baggage; and

(b) for articles en route to or from the territories of such other Party.

Such persons and articles in transit shall be exempt from transit, customs and other duties, and from unreasonable charges and requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to non-discriminatory regulations necessary to prevent abuse of the transit privilege.

3. Nationals of either Party shall be permitted to enter and remain in the territories of the other Party in order to carry on trade between the territories of the two Parties and commercial activities related thereto, upon terms as favorable as those accorded to nationals of any third country who are permitted entry for the purpose of carrying on

trade between [*4] the territories of such other Party and of such third country.

4. Each Party reserves the right to exclude or expel aliens, and to refuse transit to articles, on grounds relating to public order, morals, health and safety, and to exercise reasonable surveillance over the movement and sojourn of aliens within its territories. Moreover, paragraph 1 of the present Article shall be subject to the immigration laws of each Party.

Article III

1. Nationals of either Party shall, within the territories of the other Party, enjoy liberty of conscience and shall be permitted freely to hold religious ceremonies under the protection of the law.

2. They shall also be permitted to collect and transmit informational material for dissemination to the public abroad and to communicate with other persons located either within or outside the territory of the other Party, by mail, telegraph or any other means open to general

public use.

3. The provisions of the present. Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and to protect the public health, morals and safety.

Article IV

1. Nationals of either Party within the territories [*5] of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security.

2. If, within the territories of either Party, a national of the other Party is accused of crime and is taken into custody, he shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel.

Article V

The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to unlawful entry or molestation. Official searches and examinations of their contents, when necessary, shall be conducted with due regard to the convenience of the occupants and the conduct of their business.

Article VI

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals [*6] and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

2. Contracts entered into between nationals and companies of either

Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall [*7] be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof.

Article VII

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. With respect to the provisions of the preceding paragraph, nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and shall in any case enjoy treatment no less favorable than that accorded to the nationals and companies of the most-favored-nation.

3. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to [*8] the time of taking for the determination and payment thereof. It is understood that withdrawal of such compensation shall be in

accordance with applicable laws and regulations consistent with the provisions of Article XV of the present Treaty. The provisions of the present paragraph shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

4. In all matters relating to the taking of privately owned enterprises into public ownership or the placing of such enterprises under public control, in conformity with applicable laws, nationals and companies of either Party shall enjoy national treatment within the territories of the other Party and in any case treatment no less favorable than that accorded to the nationals and companies of most-favored nations. The same treatment shall likewise be accorded to enterprises in which nationals or companies of either Party have a substantial interest.

Article VIII

Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its

territories of nationals and companies [*9] of the other Party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, arts and technology needed for economic development.

Article IX

1. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to acquiring by purchase or otherwise and with respect to owning, leasing, occupying and using land, buildings and other immovable property appropriate to the conduct of commercial, manufacturing, processing, financial, construction, publishing, scientific, educational, philanthropic and professional activities, and for residential and mortuary purposes, subject to the following limitations:

(a) in the case of nationals and companies of Greece the acquisition by purchase, or otherwise, of ownership rights in

land, buildings, and other immovable property, within the territories of the United States, shall be dependent upon the applicable laws of the States, Territories and possessions of the United States [*10] of America within which such property is located; and

(b) in the case of nationals and companies of the United States of America the right to acquire by purchase, or otherwise, and the right to lease, occupy and use land, buildings, and other immovable property, within the territories of Greece, shall be subject to restrictions which Greece may consider it necessary to impose on the right of aliens to acquire by purchase, or otherwise, and to lease, occupy and use such property in specific frontier and coastal areas.

2. Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party with respect to the acquisition of which through testate or intestate

succession their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect such disposition.

3. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment with respect to disposing of property of all kinds.

Article X

Nationals and companies of either Party shall be accorded, within the territories of the other Party, national [*11] treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade-marks, trade names, trade labels, and industrial property of all kinds.

Article XI

1. Nationals of Greece shall be accorded within the territories of the United States of America, and reciprocally nationals of the United States of America shall be accorded within the territories of Greece,

national treatment in the application of laws and regulations that establish a pecuniary compensation, or other benefit or service, on account of disease, injury or death arising out of and in the course of employment, or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of Greece shall be accorded within the territories of the United States of America, and reciprocally nationals of the United States of America shall be accorded within the territories of Greece, national treatment in the application of laws and regulations establishing systems of compulsory insurance, under which benefits are paid without an individual test of financial need: (a) against loss of wages [*12] or earnings due to old age, unemployment, sickness, or disability, or (b) against loss of financial support due to the death of father, husband or other person on whom such support had depended.

Article XII

1. Nationals and companies of Greece shall be accorded within the

territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be accorded within the territories of Greece, national treatment and most-favored-nation treatment with respect to engaging in commercial, manufacturing, processing, financial, construction, publishing, scientific, philanthropic and professional activities, except the practice of law, dentistry and pharmacy.

2. Nationals and companies of either Party shall further be accorded, within the territories of the other Party, most-favored-nation treatment with respect to:

(a) exploring for and exploiting mineral deposits;

(b) engaging in religious activity and in fields of economic and cultural activity in addition to those listed in paragraph 1 of the present Article or in subparagraph (a) of the present paragraph;

(c) organizing, participating in and operating companies of

such other Party.

[*13]

3. Nationals of either Party admitted into the territories of the other Party for limited purposes shall not, however, enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to internal laws and regulations, as a condition of their admittance.

4. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other employees of their choice among those legally in the country and eligible to work. Moreover, such nationals and companies shall be permitted to engage, on a temporary basis, accountants and other technical experts, regardless of nationality and regardless of the extent to which they may possess the qualifications required by applicable laws for the exercise of their duties within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for the exclusive

account of their employers in connection with the planning and operation of enterprises controlled by the latter or in which they have a financial interest within such territories. [*14]

Article XIII

1. Nationals and companies of either Party shall be accorded within the territories of the other Party the right to associate and to organize companies under the same conditions as nationals and companies of such other Party for the purpose of engaging in commercial, manufacturing, processing, financial, construction, mining, publishing, scientific, educational and philanthropic activities, and to control and manage enterprises which they have been permitted to establish or acquire within such territories for the foregoing and other purposes. Either Party, however, may prescribe special formalities in connection with the formulation of alien-controlled companies under its laws.

2. Companies controlled by nationals and companies of either Party and constituted under the applicable laws and regulations within the

territories of the other Party for engaging in the activities listed in paragraph 1 of the present Article, shall be accorded national treatment with respect to such activities.

Article XIV

1. The two Parties agree that business practices which restrain competition, limit access of like enterprises to international markets or foster monopolistic control, [*15] and which are engaged in by one or more private or public commercial enterprises or are made effective by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees, upon the request of the other Party, to consult with respect to any such business practices and to take such measures as it may deem appropriate with a view to eliminating such harmful effects.

2. The Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled commercial, manufacturing or processing enterprises of

either Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other Party. Accordingly, such private enterprises shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connection with: (a) manufacturing goods for government [*16] use, or supplying goods and services to the government for government use; or (b) supplying, at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

3. Each Party undertakes:

(a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales, involving either imports or exports affecting the commerce of the other Party,

solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and

(b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

4. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to:

(a) the governmental [*17] purchase of supplies;

(b) the awarding of concessions and other government contracts; and

(c) the sale of any service sold by the Government or by any

monopoly or agency granted exclusive or special privileges.

5. No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Article XV

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions as defined in paragraph 5 of the present Article, except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect [*18] a moderate increase in very low monetary reserves. It is

understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with paragraph 2 above, it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health of its people and necessary to the avoidance of serious economic instability, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VII, paragraph 3, of the present Treaty; (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise; and (c) amounts for amortization of loans, depreciation of direct investments, and capital transfers to the extent feasible, giving consideration to special needs for other transactions. If more than one [*19] rate of exchange is in force, the

rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two Parties.

6. Each Party shall afford the other Party adequate opportunity for

consultation at any time regarding application of the present Article.

Article XVI

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either [*20] Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements, with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third

country.

3. In the case of companies of either Party engaged in trade or other gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such [*21] other Party shall not impose or apply any tax, fee or charge upon any capital, income or other basis in excess of that reasonably allocable or apportionable to its territories. Tax exemptions and deductions shall likewise be allowed according to an equitable apportionment. Comparable rules shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious, or philanthropic purposes.

4. Each Party, however, reserves the right to: (a) extend specific advantages as to taxes, fees and charges to nationals, residents and companies of third countries on the basis of reciprocity, if such advantages are similarly extended to nationals, residents and companies of the other Party; (b) accord to nationals, residents and

companies of a third country special advantages by virtue of an agreement with such country for the avoidance of double taxation or the mutual protection of revenue; and (c) accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income taxes and inheritance taxes than are accorded to other nonresident persons.

Article XVII

1. Nationals and companies [*22] of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

2. Each Party shall accord most-favorednation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to articles destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, in all matters relating to customs duties and other charges, and with respect to all other regulations, requirements and

formalities imposed on or in connection with imports and exports.

3. Neither Party shall impose any prohibition or restriction on the importation of any product of the other Party, or on the exportation of any article to the territories of the other Party, that:

(a) if imposed on sanitary or other customary grounds of a non-commercial nature or in the interest of preventing deceptive or unfair practices, arbitrarily discriminates in favor of the importation of the like product of, or the exportation of the like article to, any third country;

(b) if imposed on other grounds, does not apply equally to the importation [*23] of the like product of, or the exportation of the like article to, any third country;

(c) if a quantitative regulation involving allotment to any third country with respect to an article in which such other Party has an important interest, fails to afford to the commerce of such other Party a share proportionate to the

amount, by quantity or value, supplied by or to such other Party during a previous representative period, regarding which opportunity for discussion will be afforded such other Party, due consideration being given to any special factors affecting the trade in the article

4. The provisions of the present Article shall not apply to advantages accorded by either Party:

(a) to products of its national fisheries;

(b) to adjacent countries in order to facilitate frontier traffic; or

(c) by virtue of a customs union of which either Party may become a member. If either Party decides to enter into a customs union, it shall keep the other Party informed of its plans and shall afford such other Party adequate opportunity for an exchange of views thereon.

Article XVIII

1. Each Party shall promptly publish laws, regulations and

administrative rulings of general application [*24] pertaining to rates of duty, taxes or other charges, to the classification of articles for customs purposes and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use. Such laws, regulations and rulings shall be administered in a uniform, impartial and reasonable manner. As a general practice, new administrative regulations affecting imports shall not apply to articles en route at the time of publication of such regulations; however, if either Party customarily exempts from such administrative regulations articles entered for consumption or withdrawn from warehouse for consumption during a period of 30 days after the date of publication of such regulations, such practice shall be considered as full compliance with this rule. This rule, moreover, shall not apply in the case of regulations imposed on sanitary grounds or for reasons of public safety. In the case of quantitative regulations, articles imported after the date of publication may be charged to any quota fixed by such regulations or, if necessary, to the quota fixed for one or more subsequent periods.

2. Each Party shall provide a judicial or [*25] administrative procedure under which nationals and companies of the other Party, and importers of products of such other Party, shall be able to present information and arguments and to obtain prompt and impartial review and correction of administrative action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities. Penalties imposed for infractions of the customs and shipping laws and regulations shall be merely nominal in cases resulting from clerical errors or when good faith can be demonstrated. It is understood that the provisions for imposition of merely nominal penalties do not extend to smuggling offenses.

Article XIX

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favorednation treatment in all matters affecting internal taxation, sale. distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded [*26] therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

Article XX

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in paragraph 4 of Article XVI of the present Treaty, taxes and charges applicable to them, their samples and the taking of orders.

Article XXI

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. So long as both Parties follow systems of tonnage measurement which are substantially similar, tonnage certificates issued [*27] by either Party, shall be accepted by the other Party, and vessels shall not be subject to new measurement in the ports of such Party.

4. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national

treatment and most-favorednation treatment within the ports, places and waters of such other Party.

5. Vessels of either Party shall be accorded by the other Party national treatment and shall enjoy most-favored-nation treatment with respect to the right to carry any articles, capable of being carried by sea, to or from the territories of such other Party. Such articles shall be accorded treatment no less favorable than that accorded to like articles carried in vessels of such other Party with respect to: (a) duties and charges of all kinds; (b) customs administration; and (c) bounties, drawbacks and other privileges of this nature.

6. Each Party may reserve exclusive rights and privileges to its own vessels with respect [*28] to coasting trade, inland navigation, national fisheries and operating maritime services in ports, havens and seaboards, including towage, pilotage, salvage and rescue services. The term "coasting trade" as used in the present Article shall be deemed to include all types of sea transport to and from ports of the same Party in respect of articles which, regardless of

their initial origin and ultimate destination, are transshipped directly or indirectly at ports of either Party for carrying to another port of the same Party on the basis of a through bill of lading, or conversely articles loaded at ports of either Party for carrying to another port of the same Party for the purpose of being transshipped directly or indirectly to a foreign destination on the basis of a through bill of lading. The same principles shall apply alse to travelers holding through tickets.

Article XXII

1. Vessels of either Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other Party, and shall receive friendly treatment and assistance. Vessels of either Party forced to take refuge, because of bad weather or damage, in a port of the other Party, shall be permitted [*29] to undergo repairs, obtain supplies and leave again, without being charged any fees and dues other than those normally paid in like circumstances by vessels of that Party. However, in the event the master of the vessel should find it necessary to sell a portion of the vessel's cargo for the purpose of

defraying expenses, he shall be required to comply with the regulations and the import tariff of the place of refuge.

2. In the event a vessel of either Party should run aground or be wrecked in the territorial waters of the other Party, such vessel, as well as all parts and equipment thereof, and any goods and articles salvaged or rescued, including jetsam, or the proceeds from the sale thereof, and also all ship's documents recovered from the vessel so wrecked or stranded, shall be delivered, on request, to the owners of the vessel, or the owners of the cargo and other articles, or their agents. In the absence of such owners or agents on the spot, the vessel, cargo and other articles, if the property of a national of the Party whose flag the vessel flies, shall be delivered to a Consular officer of such Party within whose district the vessel was wrecked or stranded, provided such documents [*30] shall be claimed by the aforesaid officers within the period of time provided by the laws and regulations of that Party. Such Consular officers, owners or agents shall pay only the expenses incurred in saving the vessel and its cargo, including salvage or other fees, which a national vessel would

have paid in like circumstances of loss or stranding. Goods salvaged shall be subject to the payment of no customs duties unless such goods be declared for consumption within the territories of the other Party; but goods not entered for consumption may be subject to measures for the protection of the revenue in relation to such goods, pending their exit from the country within the time limits provided by applicable laws and regulations. The application of the present paragraph shall be subject to the lawful rights and claims of a salvor.

3. If, due to bad weather, vessels of either Party should take refuge in a port or haven of the other Party, or should be wrecked or stranded, the appropriate Consular officers shall be permitted, in the absence of the owner or of the master of the vessel or of another agent of the owner, or in the presence and at the request of any one of them, to extend [*31] to nationals of their country such assistance as may be necessary. If a vessel of either Party is wrecked within a port or constitutes a navigational hazard within the territorial waters of the other Party, the authorities of such other Party may order measures to be taken which they consider necessary with a view to preventing

damage that might otherwise be caused by such wrecked vessel to port facilities or to other vessels.

4. In all ports of Greece the masters of all ships under United States flag, and reciprocally in all ports of the United States of America the masters of all ships under Greek flag, whose crews shall have ceased to be fully constituted on account of illness or for any other cause, shall be permitted to engage such seamen as may be necessary for the continuation of the voyage.

5. Consular officers, wherever such officers of either Party are available within the territories of the other Party, shall at their request be accorded by the local authorities such assistance as they may need for carrying out, in accordance with the applicable local laws and regulations, their duties with respect to the maintenance of discipline and order aboard vessels. Disputes among [*32] members of the crews of vessels of either Party relating to their employment contracts shall, except as the competent judicial authorities may assume jurisdiction, be decided by Consular officers of the country

whose flag the vessel flies.

6. Nationals of either Party who are seamen may be sent to ports of the other Party to join national vessels, in care of Consular officers, either individually or in groups on the basis of seamen's papers used in lieu of passports. Likewise nationals of either Party shall be permitted to travel through the territory of the other Party on their way to join vessels or to be repatriated on the basis of seamen's papers used in lieu of passports.

Article XXIII

1. The present Treaty shall not preclude the application of measures:

(a) regulating the importation or exportation of gold or silver;

(b) relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials;

(c) regulating the production of or traffic in arms,

ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military [*33] establishment;

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests;

(e) relating to the export of articles whose value arises primarily from their nature as works of art or antiques or from their relationship to the nation's history and which as a matter of general rule are not considered as items of trade; and

(f) denying the advantages of the present Treaty to any company, even though it may have the nationality of the other Party, as long as ownership or direction of the company is controlled by nationals or companies of a third country. However, the provisions of the present Treaty relating to the juridical status of foreign companies and their appearance in

court, are exempted from the limiting provisions of the present subparagraph.

2. Without prejudice to the principle of national treatment as it relates to existing enterprises or enterprises which a Party may permit to be established here-after, the provisions of Article XII, paragraph 1, and Article XIII, paragraph 1 of the present Treaty, shall be subject to the right of either Party to deny [*34] authorization to banking enterprises, not owned or controlled by its nationals, to initiate hereafter a fiduciary or depository business, except with regard to deposits incidental to their foreign or international business.

3. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by the United States of America or its Territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands, to the Panama Canal Zone, or to Puerto Rico regardless of any change that may take place in its political status.

4. The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade n1 during such time as the Party taking such action is a contracting party to the General Agreement. Similarly, the most-favored-nation provisions of the present Treaty shall not apply to the special advantages accorded by virtue of the aforesaid General Agreement.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Treaties and Other International Acts Series 1700; 61 Stat., pts. 5 and 6.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [*35]

5. Without prejudice to the obligations of either Party under any other international agreement, the most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not prevent either Party from applying measures which may be deemed necessary for the utilization of reserves of nonconvertible exchange for the purpose of effecting imports.

6. The present Treaty does not accord any rights to engage in political activities.

7. The provisions of Article XIV, paragraph 4, subparagraphs (b) and (c), and of Article XXI, paragraph 5 of the present Treaty, shall not apply to postal services.

Article XXIV

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party. The term does not imply immunity from the laws and regulations of a Party which apply in a non-discriminatory manner to nationals, companies, products, vessels, or other objects, as the case may be, of both Parties.

2. The term "most-favored-nation treatment" means treatment

accorded within [*36] the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of the Kingdom of Greece shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America.

5. The term "access" as used in Article VI, paragraph 1 of the present Treaty, shall comprehend, among other things, legal aid and freedom of nationals of either Party from liability to provide both security for costs [*37] and security for judgment, on the same terms and under the same conditions as are applicable in the case of nationals of the other Party and of nationals of any third country.

6. The term "mineral" as used in Article XII, paragraph 2 (a) of the present Treaty, shall refer to petroleum as well as to other mineral substances.

7. The term "products of" as used in the present Treaty means "articles the growth, produce or manufacture of".

8. The term "vessels" as used in the present Treaty, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraph 2 of Article XXI and paragraph 1 of Article XXII, include fishing vessels or vessels of war.

Article XXV

Except as may be otherwise provided, the territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of either of the Parties, other than the Panama Canal Zone, and other than the Trust Territory of the Pacific Islands, except to the extent that the President of the United States of America shall by proclamation extend provisions of the Treaty to such Trust Territory.

The provisions [*38] of this Article shall not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation.

Article XXVI

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation with the other Party regarding any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or

application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other amicable means.

Article XXVII

The present Treaty shall replace the Treaty of establishment signed at Athens November 21, 1936. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Treaty Series 930; 51 Stat. 230.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Article XXVIII

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Athens as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. [*39] It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Greek languages, both equally authentic, at Athens, this third day of August, one thousand nine hundred fifty-one.

WHEREAS the Senate of the United States of America by their resolution of July 21, 1953, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said treaty subject to a reservation as follows:

> "Article XII, paragraph 1, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are statelicensed and reserved by statute or constitution

exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions.";

WHEREAS the text [*40] of the said reservation was communicated by the Government of the United States of America to the Government of the Kingdom of Greece by a note dated October 22, 1953 and was accepted by the Government of the Kingdom of Greece by a note dated January 18, 1954; n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Not printed.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

WHEREAS the said treaty was ratified by the President of the United States of America on June 24, 1954, in pursuance of the aforesaid advice and consent of the Senate and subject to the said reservation, and was ratified on the part of the Kingdom of Greece;

WHEREAS the respective instruments of ratification, as aforesaid,

were exchanged at Athens on September 13, 1954, and a protocol of exchange, in the English and Greek languages, was signed at that place and on that date by the respective Plenipotentiaries of the United States of America and the Kingdom of Greece, the said protocol of exchange indicating that the said reservation had been made and accepted;

AND WHEREAS it is provided in Article XXVIII of the said treaty that the treaty shall [*41] enter into force one month after the day of exchange of ratifications;

NOW, THEREFORE, be it known that I, Dwight D. Eisenhower, President of the United States of America, do hereby proclaim and make public the said treaty to the end that the same and every article and clause thereof may be observed and fulfilled in good faith on and after October 13, 1954, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, subject to the said reservation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eighteenth day of October in the year of our Lord one thousand nine hundred fifty-four and of the Independence of the United States of America the one hundred seventy-ninth.

The Greek Ministry of Foreign Affairs to the American Embassy

No 8450

NOTE VERBALE

The Royal Hellenic Ministry of Foreign Affairs presents its compliments to the United States Embassy and referring to the Treaty of Friendship, Commerce and Navigation signed in Athens today between the United States of America and the Kingdom [*42] of Greece, has the honour to state that it is the understanding of the Greek Government that Article XV of the Treaty in question is not concerned with the resumption of payment on Greek foreign debts but, in accordance with the provisions of that Article, provides for as

free transfer of funds between the two countries as may be feasible.

The Royal Ministry would appreciate a confirmation of the concurrence of the United States Governments in this view.

The Royal Hellenic Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurance of its highest consideration.

The American Embassy to the Greek Ministry of Foreign Affairs

No. 234

THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA

The Embassy of the United States of America presents its compliments to the Royal Hellenic Ministry of Foreign Affairs and has the honor to refer to the Ministry's note No. 8450 of August 3, 1951, concerning the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Greece, signed at Athens on that day, which note read as follows:

"The Royal Hellenic Ministry of Foreign Affairs presents [*43] its compliments to the United States Embassy and referring to the Treaty of Friendship, Commerce and Navigation signed in Athens today between the United States of America and the Kingdom of Greece, has the honour to state that it is the understanding of the Greek Government that Article XV of the Treaty in question is not concerned with the resumption of payment on Greek foreign debts but, in accordance with the provisions of that Article, provides for as free transfer of funds between the two countries as may be feasible.

"The Royal Ministry would appreciate a confirmation of the concurrence of the United States Government in this view.

"The Royal Hellenic Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurance of its highest consideration.

"ATHENS, *the 3d August 1951.*"

On behalf of the Government of the United States of America, the Embassy confirms its concurrence with the contents of the above note.

The Embassy avails itself of this opportunity to renew to the Royal Hellenic Ministry of Foreign Affairs the assurances of its highest esteem.

SIGNATORIES:

[SEAL]

DWIGHT D EISENHOWER

By the President:

JOHN FOSTER [*44] DULLES

Secretary of State

ATHENS *the, 3d August 1951.*

EMBASSY OF THE UNITED STATES OF AMERICA

En Ville

ATHENS, *December 26, 1951.*

To the

ROYAL MINISTRY OF FOREIGN AFFAIRS,

Athens.

LEXSEE 4 U.S.T. 2063

U.S. Treaties on LEXIS

JAPAN

FRIENDSHIP, COMMERCE AND NAVIGATION

TIAS 2863

4 U.S.T. 2063; 1953 U.S.T. LEXIS 122

April 2, 1953, Date-Signed

October 30, 1953, Date-In-Force

STATUS:

[*1] Treaty and Protocol between the UNITED STATES OF AMERICA and JAPAN

Signed at Tokyo April 2, 1953

Ratification advised by the Senate of the United States of America, with a reservation, July 21, 1953

Ratified by the President of the United States of America, subject to said reservation, September 15, 1953

Ratified by Japan, with a reservation, September 2, 1953

Ratifications exchanged at Washington September 30, 1953

Proclaimed by the President of the United States of America November 4, 1953

Entered into force October 30, 1953

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

[FOREIGN LANGUAGE TEXT OMITTED]

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a treaty of friendship, commerce and navigation between the United States of America and Japan, together with a protocol relating thereto, was signed at Tokyo on April 2, 1953, the originals of which treaty and protocol, in the English and Japanese languages, are word for word as follows:

The United States of America and Japan, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural [*2] relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of mostfavored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries,

The United States of America:

Robert Murphy, Ambassador Extraordinary and Plenipotentiary of the United States of America to Japan, and

Japan:

Katsuo Okazaki, Minister for Foreign Affairs of Japan,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

ARTICLE I

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they [*3] have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to

communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

3. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.

ARTICLE II

1. Nationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other [*4] Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is

consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

ARTICLE III

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation, or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing compulsory systems of social security, under which benefits are paid without an individual [*5] test of financial need: (a) against loss of wages or earnings due to old age, unemployment, sickness or disability, or (b) against loss of financial support due to the death of father, husband

or other person on whom such support had depended.

ARTICLE IV

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without registration or similar requirements.

2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators [*6] is not that of such other Party. Awards duly rendered

pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof.

ARTICLE V

1. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied; nor shall either Party unreasonably impede nationals and companies of the other

Party from obtaining on equitable terms [*7] the capital, skills, arts and technology it needs for its economic development.

2. The Parties undertake to cooperate in furthering the interchange and use of scientific and technical knowledge, particularly in the interests of increasing productivity and improving standards of living within their respective territories.

ARTICLE VI

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to unlawful entry or molestation. Official searches and examinations of such premises and their contents, when necessary, shall be made only according to law and with careful regard for the convenience of the occupants and

the conduct of business.

3. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and [*8] shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

4. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favorednation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing

of such enterprises under public control.

ARTICLE VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall [*9] be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other

Party.

2. Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to [*10] carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

3. The provisions of paragraph 1 of the present Article shall not

prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

ARTICLE VIII

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, [*11] accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations,

audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

3. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, [*12] educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party.

ARTICLE IX

1. Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, buildings and other immovable property appropriate to the conduct of activities in which they are permitted to engage pursuant to Article VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in immovable property permitted by the applicable laws of the other Party.

2. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, movable property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying [*13] on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent

that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

3. Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party with respect to the acquisition of which through testate or intestate succession their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect such disposition.

4. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to disposing of property of all kinds.

ARTICLE X

Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names,

trade labels and industrial property of every kind.

ARTICLE XI

1. Nationals of either Party [*14] residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied [*15] to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies of either Party engaged in trade or other gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for

scientific, educational, religious or philanthropic purposes.

5. Each Party reserves the right to: (a) extend specific tax advantages on the basis of reciprocity; (b) accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and [*16] (c) accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income taxes and inheritance taxes than are accorded to other non-resident persons.

ARTICLE XII

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions as defined in

paragraph 5 of the present Article except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with [*17] paragraph 2 above, it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 3, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct

investments, and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, [*18] trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two Parties.

ARTICLE XIII

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in paragraph 5 of Article XI, taxes and charges applicable to them, their samples and the taking of orders, and regulations governing the exercise of their functions.

ARTICLE XIV

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories [*19] of such other Party, by whatever route and by whatever type of carrier, with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such

duties and charges, and with respect to all rules and formalities in connection with importation and exportation.

2. Neither Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

3. If either Party imposes quantitative restrictions on the importation or exportation of any product in which the other Party has an important interest:

(a) It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and

(b) If it makes allotments to any third country, it shall [*20]

afford such other Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due consideration being given to any special factors affecting the trade in such product.

4. Either Party may impose prohibitions or restrictions on sanitary or other customary grounds of a noncommercial nature, or in the interest of preventing deceptive or unfair practices, provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other Party.

5. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

6. The provisions of the present Article shall not apply to advantages accorded by either Party:

(a) to products of its national fisheries;

(b) to adjacent countries in order to facilitate frontier traffic; or

(c) by virtue of a customs union or free-trade area of which it may become a member, so long as it informs the other Party of its plans and affords such other Party adequate opportunity for consultation.

7. Notwithstanding the provisions [*21] of paragraphs 2 and 3 (b) of the present Article, a Party may apply restrictions or controls on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions applied pursuant to Article XII. However, such restrictions or controls shall depart no more than necessary from the aforesaid paragraphs and shall be conformable with a policy designed to promote the maximum development of nondiscriminatory foreign trade and to expedite the attainment both of a balance-of-payments position and of monetary reserves which will obviate the necessity of such restrictions.

ARTICLE XV

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to rates of

duty, taxes or other charges, to the classification of articles for customs purposes, and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner. As a general practice, new administrative requirements or restrictions affecting imports, with [*22] the exception of those imposed on sanitary grounds or for reasons of public safety, shall not go into effect before the expiration of 30 days after publication, or alternatively, shall not apply to products en route at time of publication.

2. Each Party shall provide an appeals procedure under which nationals and companies of the other Party, and importers of products of such other Party, shall be able to obtain prompt and impartial review, and correction when warranted, of administrative action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities. Penalties imposed for infractions of the customs and shipping laws

and regulations concerning documentation shall, in cases resulting from clerical errors or when good faith can be demonstrated, be no greater than necessary to serve merely as a warning.

3. Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party. The present paragraph is [*23] subject to the provisions of Article XII.

ARTICLE XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded

therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

ARTICLE XVII

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, [*24] companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce

of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of concessions and other government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

ARTICLE XVIII

1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate [*25] with a view to eliminating such harmful effects.

2. No enterprise of either Party, including corporations, associations,

and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

ARTICLE XIX

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and

waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects [*26] be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party.

4. Vessels of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other Party; and such products shall be accorded treatment no less favorable than that accorded to like products carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either Party, in case of shipwreck, stranding, or of being forced to put into the ports, places and waters of the other Party, whether or not open to foreign commerce and navigation, shall enjoy the same assistance and protection as are in like cases enjoyed by vessels of such other Party or of any third country, and shall not be

subject to any duties or charges other than those which would be payable in like circumstances by vessels of such other Party or of any third country. The cargoes of such vessels of either Party [*27] and all articles salvaged from them shall be exempt from customs duties unless entered for consumption within the territories of the other Party; but articles not entered for consumption may be subject to measures for the protection of the revenue pending their exit from the country.

6. Notwithstanding any other provision of the present Treaty, each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, national fisheries and inland navigation, or may admit foreign vessels thereto only on a reciprocity basis.

7. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

ARTICLE XX

There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit:

(a) for nationals of the other Party, together with their baggage;

(b) for other persons, together with their baggage, en route to or from the territories of such other Party; and

(c) for products of any origin en route to [*28] or from the territories of such other Party.

Such persons and things in transit shall be exempt from customs duties, from duties imposed by reason of transit, and from unreasonable charges and requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to measures referred to in paragraph 3 of Article I, and to nondiscriminatory regulations necessary to prevent abuse of the transit privilege.

ARTICLE XXI

1. The present Treaty shall not preclude the application of measures:

(a) regulating the importation or exportation of gold or silver;

(b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials;

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and

(e) denying to any company in the ownership [*29] or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.

2. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by the United States of America or its Territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

3. The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade n1 during such time as such Party is a contracting party to the General Agreement. Moreover, either Party may withhold advantages negotiated under the aforesaid Agreement from those countries which by their own choice are not contracting parties thereto.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Treaties and Other International Acts Series 1700; 61 Stat., pts. 5 and 6.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - [*30]

4. Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance.

5. Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.

ARTICLE XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case

may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws [*31] and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of Japan shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

ARTICLE XXIII

The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each

Party, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands, except to the extent that the President of the United States of America shall by proclamation extend provisions of the Treaty to such Trust Territory.

ARTICLE XXIV

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation [*32] or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

ARTICLE XXV

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Japanese languages, both equally authentic, at Tokyo, this second day of April, one thousand nine hundred fifty three.

PROTOCOL

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, the undersigned Plenipotentiaries, duly authorized by their [*33]

respective Governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

1. The term "access to the courts of justice and to administrative tribunals and agencies" as used in Article IV, paragraph 1, comprehends, among other things, legal aid and security for costs and judgment.

2. The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

3. The term "public utility enterprises" as used in Article VII, paragraph 2, is deemed to include enterprises engaged in furnishing communications services, water supplies, transportation by bus, truck or rail, or in manufacturing and distributing gas or electricity, to the general public.

4. With reference to Article VII, paragraph 4, either Party may require that rights to engage in mining shall be dependent on reciprocity. Furthermore, Japan shall not be obliged by the terms of that paragraph to accord to enterprises of nationals and companies of the United States of the types mentioned [*34] in the first sentence of paragraph 2 of Article VII more favorable treatment than that accorded by the State or Territory of the United States of America in which such national is domiciled, or pursuant to the laws of which such company is organized, or in which, if such company is organized under Federal law, such company has its principal office, to the enterprises of nationals and companies of Japan.

5. The provisions of Article VIII, paragraph 2, shall not extend to the professions of notary public and port pilot.

6. Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, paragraph 2.

7. With reference to Article XIV, paragraph 4, it is understood that either Party, acting in accordance with its laws, may prohibit the importation into its territory, or seize, or otherwise restrict or regulate the sale of any goods with respect to which there has been failure to comply with marking requirements established to assure that the true geographic or commercial origin of such goods is correctly represented. Furthermore, each Party agrees to take appropriate steps to prevent misrepresentations, [*35] direct or indirect, that goods produced or sold in or exported from its territory originate within the territory of the other Party or any distinctive place within such territory.

8. During periods of emergency resulting in reduced availabilities of industrial raw materials and basic foodstuffs, the provisions of Article XVI, paragraph 1, of the present Treaty shall not prevent the application by either Party of needed controls over the internal sale, distribution or use of imported articles of categories which may be in short supply, other than or different from controls applied with respect to like articles of national origin. If imposed, such controls

shall be applied by either Party in such a manner as to minimize injury to the competitive position within its territories of the commerce of the other Party, and shall be continued no longer than required by the supply situation.

9. Notwithstanding the national treatment provisions of Article XVI, paragraph 1, a Party may maintain screen quota regulations that require the exhibition of cinematograph films of national origin during a specified minimum portion of the screen time actually utilized by exhibitors for the commercial exhibition [*36] of all films. Screen quotas shall be computed on the basis of screen time per theatre per year or the equivalent thereof, and shall be subject to consultation.

10. It is understood that for the purposes of Article XVII, paragraph 1, availability of means of payment is considered to be a commercial consideration.

11. The provisions of Article XVII, paragraph 2 (b) and (c), and of

Article XIX, paragraph 4, shall not apply to postal services.

12. The provisions of Article XXI, paragraph 2, shall apply in the case of Puerto Rico regardless of any change that may take place in its political status.

13. Article XXIII does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation, or to Nansei Shoto south of 29 degrees north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island, the status of which is provided for in Article 3 of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Treaties and Other International Acts Series 2490; 3 UST, pt. 3, p. 3169.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*37]

14. The most-favored-nation treatment provisions of the present Treaty shall not apply with respect to those rights and privileges which may be accorded by Japan to: (a) persons who originated in the territories to which all right, title and claim were renounced by Japan in accordance with Article 2 of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951; or (b) the native inhabitants and vessels of, and trade with, the islands mentioned in Article 3 of the said Treaty of Peace.

15. During a transitional period of three years from the date of the coming into force of the present Treaty, Japan may continue to apply existing restrictions on the purchase by aliens, with yen, of outstanding shares in Japanese enterprises.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Japanese languages, both equally authentic, at Tokyo, this second day of April, one thousand

nine hundred fifty three.

[FOREIGN LANGUAGE TEXT OMITTED]

WHEREAS the Senate of the United States of America by their resolution of July 21, 1953, two-thirds of the Senators present concurring therein, [*38] did advise and consent to the ratification of the aforesaid treaty and protocol subject to a reservation as follows:

> "Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are statelicensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions.";

WHEREAS, by an exchange of notes signed at Tokyo on August 29, 1953, the aforesaid reservation was communicated by the Government of the United States of America to the Government of Japan and was accepted by the Government of Japan;

WHEREAS the aforesaid treaty and protocol were ratified by the President of the United States of America on September 15, 1953, in pursuance of the aforesaid advice and consent of the Senate and subject to the aforesaid reservation;

WHEREAS, by an exchange of notes signed at Tokyo on August 29, 1953, the Government of Japan communicated to the Government of the United States of America, and the Government of the United States of America accepted, a reservation reading [*39] in translation as follows:

> "Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions.";

WHEREAS the aforesaid treaty, the provisions of the aforesaid protocol being considered integral parts thereof, was ratified on the part of the Government of Japan on September 2, 1953, subject to the reservation last recited hereinbefore;

WHEREAS the respective instruments of ratification, as aforesaid, were exchanged at Washington on September 30, 1953, and a protocol of exchange, in the English and Japanese languages, was signed at that place and on that date by the respective Plenipotentiaries of the United States of America and Japan, the said protocol of exchange indicating that the aforesaid reservations had been made and accepted;

AND WHEREAS it is provided in Article XXV of the aforesaid treaty [*40] that the treaty shall enter into force one month after the day of exchange of ratifications, and it is provided in the aforesaid protocol that the provisions thereof shall be considered integral parts of the aforesaid treaty;

NOW, THEREFORE, be it known that I, Dwight D. Eisenhower, President of the United States of America, do hereby proclaim and make public the aforesaid treaty and the aforesaid protocol to the end that the same and every article and clause thereof may be observed and fulfilled in good faith on and after October 30, 1953, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, subject to the aforesaid reservations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fourth day of November in the year of our Lord one thousand nine hundred fifty-three and of the Independence of the United States of America the one hundred seventy-eighth.

SIGNATORIES:

FOR THE UNITED STATES OF AMERICA:

ROBERT MURPHY

[SEAL]

FOR JAPAN:

KATSUO OKAZAKI

[SEAL]

[FOREIGN LANGUAGE TEXT OMITTED]

[SEAL]

DWIGHT D EISENHOWER

[*41]

By the President:

JOHN FOSTER DULLES

Secretary of State

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

DEPARTMENT C-12

COPY

JAMES HALUCK AND MICHAEL LITTON, PLAINTIFF(S), VS. RICOH ELECTRONICS, INC, ET AL., DEFENDANT(S).	CASE NO.: 03CC10166

HONORABLE JAMES M. BROOKS, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 29, 2004

Appearances of Counsel:

For The Plaintiffs: Michelle A. Reinglass & John Y. Igarashi Attorneys at Law

For The Defendants: Littler Mendelson By: Kenneth J. Rose Attorney At Law

Lisa A. Augustine, RPR, CSR #10419

Official Court Reporter

Sir.

Mr. Rose: Your Honor, There was evidentiary objections to be made –

Ms. Reporter: I'm sorry. I can't hear you.

Mr. Rose: Evidentiary Objections.

The Court: They're all overruled. And I apologize for not putting that in the written portion.

Mr. Rose: Okay. What we have attempted to do here, your Honor, is to narrow this case so that it will not be a two- to three-month trial as plaintiff counsel has indicated to me

We have an issue involving claims of failure to promote by each of the plaintiffs, and those claims should be dismissed on either of three grounds that we presented. One was the application of the U.S. Japan Friendship Treaty, the second was the bonafide patient of qualification defense, and the Third is Statute of Limitations.

And I'm going to address the first and the third because in view of your denial of our objections to evidence it's probably not worth the time to go through them.

The Court: I believe I've addressed all of your issues; have I not? I tried not to skirt around anything.

Mr. Rose: Let me start here.

The Court: While you may disagree with the outcome,

I think I addressed them.

Mr. Rose: With regard to the treaty. If I understand your Honor's ruling, based upon what was faxed to us, you agreed with the plaintiff's position that the Kirmse case absolutely precludes the subsidiary of a Japanese Parent Corporation, that is a U.S. Incorporated Subsidiary, of a Japanese Parent Corporation from, in any way, using the Friendship Treaty as a defense to claims of discrimination.

And, with all due respect, that is not a fair reading of Kirmse. Kirmse does say that it is very narrow where there may be exceptions and that was not addressed by the Court.

Now, the Kirmse case looked to the U.S. Supreme Court's decision in Sumitimo. And the Sumitomo case, U.S. Supreme Court, did rule that a subsidiary could not directly rely on the Treaty. But in a footnote, which has become the issue in several Federal Court of Appeal cases, the U.S. Supreme Court said that if we give no view as to whether a U.S. Subsidiaries may assert any Article they want it wants rights of its parent, in other words, the Treaty, and thus left that question open.

There then has followed at least four U.S. Court of Appeal opinions, which we've cited in our papers, and these are interpreting a U.S. Supreme Court decision and a Federal Treaty.

And in each of those cases the Court, in

essence, stated that if the alleged discrimination was based upon decision making by the Parent Company, then that subsidiary could utilize the Treaty based upon – basically it uses the parents of Treaty for its defense.

Now in Kirmse the Court did not agree with the Company's defense that's based on the Treaty. But it did have to make note of footnote 19 from the Sumitomo decision. And the Court stated that the issue reserved by footnote 19 of the Sumitomo decision continues to pose serious and unresolved questions. There are, of course, well established grounds in many areas of the law for raising the rights of a closely related third party.

It then goes on to cite the U.S. Supreme Court Case of Edmondson, 500 U.S. 614.

The Court: Time out. You've got nine motion, you've got nine parties, you've got three and four issues within each motion, and you've used five minutes on the first issue and the first motion. You've got five more minutes to cover all the rest. So I suggest you hone in on the ones that are really critical to your case that you think I really botched and that I'm wrong so that you frame it for the Court of Appeal, Counsel. Because I read all this. We've analyzed it. And we disagree on it. But if I made a mistake underline it on the record for your Appeal right.

Mr. Rose: What I'm indicating, your honor, is your